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No. 569

IN THE

Supreme Court of the United States

OCTOBER TERM 1961

I. L. F. Y. Co.,

Appellant,

—against—

THE TEMPORARY STATE HOUSING RENT COMMISSION and MARY ALICE JONES,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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(a) Report of Opinions in Courts Below

The Court of original jurisdiction wrote an opinion (New York Law Journal, May 4, 1961), which is set forth at (94 to 99*) of the certified record on appeal.

Upon direct appeal to the New York Court of Appeals pursuant to Subdivision (4) Section 588 of the Civil Practice Act, of the State of New York, Chief Judge Desmond wrote an opinion sustaining constitutionality of the amended statute (10 N. Y. 2nd 263).

Said opinion is set forth in the appendix (pp. 1a-8a), and states in part:

> "Plaintiff has taken a direct appeal from the Court of first instance to this Court (Civil Practice Act,

* All numbers refer to folios of the record on appeal in the New York Court of Appeals.

588(4)) asserting the invalidity under the federal and state constitutions of three 1961 amendments (L. 1961, Ch. 337) to the Emergency Housing Rent Control Law" (appendix, p. 1a).

A copy of the order of remittitur of the New York Court of Appeals is set forth in the appendix (pp. 12a-13a) and the judgment of the Supreme Court, New York County entered upon such remittitur is printed in the appendix (pp. 14a-15a).

(b) The Jurisdiction of This Court Is Based on the Following:

(i) This action was commenced by a complaint (43-81), which sought a declaratory judgment and injunctive relief against the enforcement of three provisions of the amended Residential Rent Control Statute adopted by the 1961 Legislature of the State of New York in extending residential rent control pursuant to the provisions of Chapter 337 of the Laws of 1961 of the State of New York. The challenged amendments are in derogation of appellant's constitutional rights in the following three respects in that they: (1) deprive appellant from securing a reasonable rent and fair return on its property until it has owned such property for a minimum period of one year; (2) prohibit the effectiveness of an award in a reasonable rent or fair return proceeding prior to the date of its issuance irrespective of the time consumed in the processing of the application and irrespective whether such date of issuance is months or years subsequent to said one year probationary period; (3) apply the aforesaid provisions of the amended statute retroactively to proceedings pending on the effective date of said amended statute.

Appellees moved to dismiss the complaint (37-39) and (28-33) "solely because the Emergency Housing Rent Control Law is constitutional".

The Supreme Court, New York County granted the motions to dismiss the complaint (94-99) and judgment was entered thereon (22-27).

(ii) The final order and judgment of the New York Court of Appeals affirming the judgment of the Court of original instance holding Chapter 337 of the Laws of 1961 of the State of New York constitutional was dated and filed July 7, 1961 but not served until September 28, 1961. The notice of appeal to this Court was served and filed September 29, 1961, in the office of the Clerk of the Supreme Court, County of New York, which is the Court possessed of the record and proceedings in this cause.

(iii) Jurisdiction of the appeal to this Court is conferred by the provisions of 28 United States Code, Section 1257(2). The Court of Appeals of the State of New York is the highest Court of that State and the order and judgment of that Court affirm the constitutionality of a statute which violates the due process and equal protection of the laws provisions of the Fourteenth Amendment of the Constitution of the United States.

(iv) Cases sustaining the jurisdiction of this Court include the following:

East New York Savings Bank v. *Hahn*, 326 U. S. 320;

Pennsylvania Coal Company v. *Mahon*, 260 U. S. 393;

Paulos v. *New Hampshire*, 345 U. S. 395, 402.

(v) The challenged provisions of the amended statute are set forth in the opinion of the Court of Appeals and are printed in the appendix, p. 11a.

(c) Questions Presented by This Appeal

This appeal involves the constitutionality of the Emergency Housing Rent Control Law of the State of New York (Chapter 274, Laws of 1946, as last amended effective June 30, 1961, by Chapter 337, Laws of 1961). Appellant contends that the amended statute violates the Constitution of the United States in the following major respects:

(i) It violates the due process clause of the Fourteenth Amendment of the Constitution of the United States.

(a) Insofar as it deprives appellant of a fair return and reasonable rent on its property by prohibiting the appellee, Temporary State Housing Rent Commission, (hereinafter referred to as the Commission) from:

I—determining any reasonable rent proceeding until appellant has owned its property for one year; and

II—making any award in any such reasonable rent or fair return proceeding effective prior to the date of its issuance irrespective whether such order is issued months or even years subsequent to such one year ownership period.

(b) Insofar as it makes the provisions of the amended statute retroactively applicable to appellant's fair return and reasonable rent application, pending many months prior to the effective date of said amended statute.

(ii) It violates the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States insofar as it discriminates against appellant by prohibiting it for a minimum of one year from securing a return of 6% on the value of the property as reflected by either:

(a) The equalized assessed valuation of the property, while owners who purchased property prior to March 15, 1957, are entitled to a 6% return on the equalized assessed valuation as promptly as applications can be processed; or

(b) Appellant's purchase price, while owners who purchased properties between March 15, 1957 and June 30, 1960, (one year prior to the effective date of the Statute) are entitled to a 6% return on said purchase price as soon as the processing of the application can be completed.

(d) Statement of the Case

Appellant is the owner of premises 320 E. 57 St., New York, N. Y., located in the luxury Sutton Place area of the City of New York. Appellant purchased said premises on February 20, 1961, for $1,375,000 as the result of a contract executed November 19, 1960. The seller was paid all cash of $992,144.91 above the first mortgage then outstanding of $385,230.09 (50-51).

The residential rentals of the subject property like all premises in the City of New York constructed prior to February 1, 1947, have been controlled since November 1, 1943, based upon a freeze date of March 1, 1943. (See *315 West 97 St. Corp.* v. *Boules*, 156 Fed. 2nd 982, cert. den. 329 U. S. 801.)

Effective May 1, 1950, the State of New York as permitted by the then existing Federal law (the Federal Housing &

Rent Act of 1949, 50 U. S. C. A. App. 1894 Section 204J), substituted State rent control for Federal rent control. The State enactment was Chapter 274 of the Laws of 1946, as amended by Chapter 250 of the Laws of 1950 of the State of New York. Said statute prescribed directives to the Commission to provide regulations for the individual adjustment of maximum rents no later than March 15, 1951, on a generally fair and equitable basis.

In *Teeval Co., Inc.* v. *Stern*, 301 N. Y. 346, certain retroactive provisions of said statute were set aside as violative of the supremacy clause of the United States Constitution. This Court denied certiorari on the application of the defendant tenant and the State of New York, and likewise denied the cross-petition of the landlord, Teeval Co., Inc., which was purely conditional in the event certiorari was granted on the main application (340 U. S. 876).

Since March 15, 1951, the State Rent Control Statute has prescribed for a fair return on value as the constitutional compensation for continued control. From March 15, 1951 to June 30, 1957 valuation was bottomed upon the equalized assessed valuation in effect at the time of the filing of the application with discretion vested in the Commission to adopt an alternative valuation in four enumerated instances, inter alia, where there had been a bona fide sale of the property between March 15, 1951, and the time of the filing of the application (Chapter 443 Laws of 1951; Chapters 320 and 321 Laws of 1953; Chapter 685 Laws of 1955). During these years, the State rent control statutes, unlike their Federal predecessors of 1948 and 1949 (see *Wasservogel* v. *Meyerowitz*, 300 N. Y. 125) made no provision for the retroactivity of adjustment orders prior to the date of issuance, but no constitutional challenge thereto was ever made.

Attempts to require new owners of property to await a probationary moratorium before filing and securing a fair return were repeatedly rejected by the courts.

Matter of DiVarco v. *McGoldrick*, 281 App. Div. 955;
Matter of Florell v. *Weaver*, 155 N. Y. S. 2nd 222, aff'd 2 A. D. 2nd 541, unan. aff'd 2 N. Y. 2nd 982.

In *DiVarco*, the Metropolitan Life Insurance Co. had filed an application for a fair return on property it had acquired during foreclosure. During the pendency of the application, the property was sold and the Commission awarded the increase to the purchaser. Special Term set aside the order, but the Appellate Division unanimously reversed on the Administrator's appeal. Significantly, the Commission in its brief noted that a requirement forcing an owner to wait a year "would be clearly contradictory to the legislative intent that landlords should not be compelled to subsidize tenants. (Rent Control Plan, January 15, 1951, p. 18.)" How can such a subsidy be justified 10 years later?

In *Florell*, the Commission attempted by administrative regulation to adopt a one-year probationary moratorium but the courts abolished this regulation. Special Term in its opinion noted in part:

> "By the time the application is processed, the new landlord has indeed become an old owner, and by the time of decision has already served practically all his 'probation' so that there is no reasonable basis for further distinction as between new and old owners (155 N. Y. S. 2nd at 214)."

The Appellate Division which held the regulation invalid by a divided court, stated in part:

"The Commission is undertaking to hamstring itself by this regulation . . . Contrary to the statutory intent, the challenged regulation attempts to impose an arbitrary standard that would preclude both bona fide and suspect applications for adjustments . . .

"It was argued that the regulation merely postpones the owner's right to a rent adjustment. Since the adjustment cannot be retroactive prior to the date of the order, that argument is specious (citing cases). When in addition there is taken into consideration the delay occasioned by the processing of an application for a rent adjustment, the owner entitled to an increase would be prevented from receiving it, under the regulation, for a period varying from one year and four months to as long as two years." (2 A. D. 2nd at 542; 157 N. Y. S. 2nd at 171.)

The 1957 Legislature in extending the rent control statute (Chapter 755 Laws of 1957), changed the regulatory pattern as follows:

(1) It established the mandatory valuation base at the most recent bona fide sale since March 15, 1953, provided such sale price was the result of a transaction "at arms' length, on normal financing terms and unaffected by special circumstances".

(2) It provided for the retroactive effectiveness of orders of adjustment as of a date two months from the time of the filing of the application.

(3) It specifically rejected the request of the Commission to provide for a one-year probationary moratorium.

Thus, the report of the legislative study commission (The Temporary State Commission to Study Rents and Rental Conditions) stated in part:

> "The attempts to amend the law in two particulars as contained in the Bill sponsored by the Rent Administrator are calculated to circumvent two decisions of the courts. One such decision invalidated a regulation promulgated by the Administrator which had disregarded the sales price which the law required him to consider in evaluating property . . . In the other case (Matter of Florell, supra) in which a regulation of the Administrator was struck down by the court, the court said that if the regulation was permitted to stand, the Administrator would have been forced to 'hamstring' himself and would preclude bona fide and suspect applications for adjustments." (McKinneys 1957 Session Laws at 1548.)

The New York Court of Appeals had occasion to interpret the mandatory sales price provision in a number of instances. (*Matter of Ackerman* v. *Weaver*, 6 N. Y. 2nd 283; *Matter of Realty Agency Inc.* v. *Weaver*, 7 N. Y. 2nd 249.) In *Ackerman*, the New York Court of Appeals held that, "The statute contemplates that tenants will be required to pay a reasonable rent" (6 N. Y. 2nd at 287). In the *Realty Agency* appeal, the Court stated in part that the statute

> "in its present form expressly mandates the use of sales price if the sale took place after March 15, 1953, as opposed to assessed valuation, for, as the legislative commission pointed out, bona fide sales prices are 'a more accurate reflection of value in fair return applications' (New York State Leg. Annual 1957, p. 264; Matter of Ackerman v. Weaver, 6 N. Y. 2nd 283, 287)." (7 N. Y. 2nd at 252.)

With respect to the special circumstance safeguard, the New York Court of Appeals stated:

"That term (special circumstances) is not defined by statute except as it is illustrated, namely, 'such as a forced sale, exchange of property, package deal, wash sale or sale to a cooperative . . . The illustrations set forth in the statute are of situations where the price yielded a distorted reflection of value." (7 N. Y. 2nd at 254.)

On January 15, 1961, the Commission through its Administrator, Robert E. Herman, issued a report of its operations under the statute and analyzed the provisions dealing with the fair return adjustment based on recent sales prices. The report noted that there are "$1,800,000 controlled accommodations" in the City of New York, and then reported as follows (Herman Report, p. 16):

"In determining fair return cases, the Rent Control Law mandates the use of assessed valuations in some cases and sales prices in others. A total of 1,727 landlord applications involving buildings containing 13 or more apartments was submitted under the applicable Net Annual Return (53-5) Section of the Rent Regulations during the period January 1, 1958 through October 20, 1960. Of the 1,727 total, 939 cases had a sale price valuation basis and of these, 742 were granted and 197 were denied.

"Previous applications among the 742 grants based upon sales price valuation were reviewed as far back as March 15, 1951—the earliest date such an application could have been filed. This study showed that 557 had received no prior grant since March 15, 1951; 153 had received only 1 prior grant; 26 had received 2 prior grants and 6 had been awarded 3 prior grants. Thus, 185 of the 742 cases processed on a sale price

valuation during this period had received more than one grant.*

"*An analysis of the 185 sale price cases where one or more prior grants had been received showed that 84 were based upon the same purchase price used in the prior grant; 54 had the equalized assessment used as the valuation in the prior grant; and only 47 cases (40 of which had only one prior grant) had their most recent award based upon the higher purchase price than that used in a prior grant.* (Italics supplied.)

"In addition, 664 of 742 cases receiving sales price grants showed that the sales price was higher than the equalized assessed valuation, *while 76 involved a sales price which was lower than the equalized assessed valuation. In two cases, the sales price and the equalized assessed valuation were the same.*

"In 17 cases, the Commission rejected the applicant's proposed use of sales price as the valuation and used instead the equalized assessed valuation which in 11 instances was lower than the sales price." (Italics supplied.)

On February 27, 1961, a five-man committee under the chairmanship of Honorable James W. Gaynor, Commissioner of Housing, and of which the Administrator of the appellee Commission was a member, issued a report recommending the challenged amendments, all of which were ultimately adopted by the Legislature.

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* The incongruous reference to "185 of the 742" cases which had "received more than one grant" refers to situations where there has been more than one application *on the same sale price* as the better reflection of value than assessment. The Statute Section 4.4b precludes increases of more than 15% in any one year thus forcing a property owner to file repeat applications when the earnings of the property are materially below 6%; or in the alternative where there had been one adjustment based upon an assessment and another adjustment based upon a bona fide sale price.

Said report (McKinney's 1961 Session Laws, pp. 1986-1995) quoted the foregoing excerpt of the Herman Report (McKinney's 1961 Session Laws, pp. 1987-1988) and then stated so far as here material as follows: (McKinney's 1961 Session Laws 1988-1989.)

> "An analysis of these statistics thus discloses that, for the entire twenty-two month period covered*— the period following the statutory amendment mandating the use of sales price in lieu of assessed valuation— there were 939 sales price applications, of which 742 were granted. In only 185 cases was there a prior grant, and of these cases, *only 47 of the prior grants were based on a lower sale price. Of these 47 cases, there were only 7 cases involving more than one prior grant based on sales price.*
>
> "In short, from March 15, 1951, to October 20, 1960 —almost ten years—there were just 7 applications granted in the State where there was a history of more than one prior grant based on a lower sales price than that used in the most recent application. *There is obviously little support in fact for the assertion that a widespread practice exists of repeated sales resulting in spiralling rents.* (Italics supplied.)
>
> "This is not to say, however, that other abuses and inequities have not arisen under the present statutory provision with respect to the use of a sales price valuation. *The legislative adoption of sales price rather than assessed valuation as a preferable index of current property value accords with accepted valuation principles and practice which traditionally pay heed to recent sales as, prima facie, the better test of current value.* However, the legislative intent was also

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* The reference to a 22-month period is an obvious mechanical error because from January 1, 1958, to October 20, 1960, represents virtually 34 months and not 22 months.

to provide the Administrator with authority to curb any cycle of successive sales followed by application for adjustment . . . (See Report of New York State Temporary Commission to Study Rents and Rental Conditions, March 20, 1957, Page 23.)" (Italics supplied.)

"The Emergency Housing Rent Control Law presently prescribes the use of a sales price as the valuation of a property

"'. . . where there has been a bona fide sale of the property within the period between March 15, 1953, and the time of filing of the application, as the result of a transaction at arms' length, on normal financing terms at a readily ascertainable price and unaffected by special circumstances such as a forced sale, exchange of property, package deal, wash sale or sale to cooperative; provided, however, that where there has been more than one such bona fide sale within a period of two years prior to the date of the filing of such application the Commission may disregard the most recent of such sales only if a prior sale within such two-year period was adopted as the valuation of the property in a proceeding under this subparagraph.'

"Thus, the present statute contains various safeguards. The Act prohibits the use of a sales price where it is not the best reflection of the property's current value because the circumstances involved distort the terms of the transaction. A minimum two-year period is also imposed before the Commission is required to adopt a higher bona fide sales price where the previous bona fide sales price had been adopted in a prior application.

"It has been claimed that sales are made between persons or corporations closely related or connected,

which are in fact exchanges, deals, sweetheart transactions, or wash sales, at prices fixed so as to qualify for rent adjustments under the fair return provision of the Rent Law. Actually where such circumstances are found to exist no rent adjustments are allowed by the Commission. The statutory provisions, as previously quoted, are amply broad—and have been used by the Commission—to bar any such possible abuse.

"The statutory language requiring normal financing terms is necessarily couched in general terms in order to permit its flexible application in all cases. From 1957 to 1959, the administrative approach to these safeguards was to apply an inflexible and conclusive presumption that normal financing terms were always present whenever the cash payment equalled or exceeded 15% of the sales price, and always absent whenever the cash payment was less than 15%. After the Courts uniformly rejected this narrow concept as an improper abandonment of administrative discretion, the present administrator in 1959 assigned personnel having both real estate and legal experience to make an exhaustive analysis of property transactions where sales prices were used in applying for fair return adjustments. In order to insure the gathering of all the facts and an opportunity for both landlords and tenants to be heard, the practice of conducting a preliminary hearing was adopted, particularly in the cases of great complexity. With the cooperation of the Rent Control Committee of the Bar Association of the City of New York, a supplementary application form was prepared, the completion of which was required where a sales price was requested as the valuation base of the property. In addition, detailed objective criteria were developed, to be used in the analysis of a sales price and the determination as to whether it meets the

statutory definition. Each application is treated on its own merits in this fashion."

Subsequent to the receipt of said report, the holding of a legislative hearing and the issuance of a report by the Legislative Study Commission, the challenged amendments were enacted into law effective June 30, 1961.

In the meanwhile, and on February 27, 1961, appellant had filed its application for reasonable rent relief and on April 20, 1961, the date the statute was enacted into law by the signature of the Governor, this action for declaratory judgment was instituted. The appeal was argued in the New York Court of Appeals on June 7, 1961, before the effective date of the Act but the judgment of affirmance was rendered July 7, 1961 after the effective date of the Act. Since the Commission did not complete its action on appellant's application prior to June 30, 1961, it is prohibited from acting thereon prior to February 20, 1962, one year from the date appellant became the owner of the property.

The complaint challenged constitutionality of the amended statute on Federal as well as on State constitutional grounds (57; 70; 72; 76-79). The opinion of Special Term (94-99) is based solely on constitutional grounds and the opinion of Chief Judge Desmond of the New York Court of Appeals quoted *supra*, p. 7, asserts that the statute is challenged on Federal as well as on State constitutional grounds.

The foregoing review of the proceedings in the New York courts, particularly in the Court of Appeals, State of New York, demonstrates that this Court has jurisdiction of this cause under the provisions of 28 U. S. C., Section 1257(2), since (1) there is directly involved the legality of Chapter 337 of the Laws of 1961 of the State of

New York under the provisions of the Constitution of the United States, and (2) the highest court of the State of New York, has sustained the constitutionality of that legislation.

(e) The Federal Questions Are Substantial

(1) There are no disputed issues of fact upon which the ultimate determination of constitutionality of the amended statute depends. The statute by its terms prohibits appellant from securing a reasonable rent for its property until a minimum of one year since appellant's purchase namely until February 20, 1962, when residential rent control in New York will be nineteen years old.

In *Bowles* v. *Willingham*, 321 U. S. 503, this Court sustained constitutionality of the wartime Federal statute with the observation that the Administrator was mandated to establish maximum rents on a generally fair and equitable basis accompanied by a directive to provide for adjustment of such maximum rents to reflect increased property taxes and other operating costs.

If either the wartime statute or the State Act had made no provision whatsoever for any property owner to secure adjustment of maximum rents on a generally fair and equitable basis, immediately, and not a year later, both laws would be clearly incompatible with the *Willingham* case.

While the statute under review makes provision for a fair return premised on either equalized assessed valuation or sale price depending upon the date of purchase, for all property owners after one year of ownership, appellant submits that complete deprivation of a reasonable rent for one full year constitutes confiscation of property *after eighteen years of residential rent control.*

The New York Court of Appeals bottomed its approval of this one year probationary moratorium on two basic grounds.

Firstly, the learned Chief Judge stated in part as follows (appendix, pp. 4a-5a):

> "Appellant does not dispute the continuance of the housing emergency which is the predicate for these housing rent control laws. It cannot deny that prohibitions against rent increases may in an emergency be constitutional although they reduce the value of the property regulated and deprive its owner of what otherwise would be considered a fair return (see *Bowles* v. *Willingham*, 321 U. S. 503; *Teeval Co.* v. *Stern*, 301 N. Y. 346, 362, certiorari denied 340 U. S. 876)."

It is respectfully submitted that the New York Court of Appeals has misconceived this Court's actions in the two cited cases. In *Willingham*, this Court dealt with a Federal statute enacted pursuant to the war power at the height of the shooting war, which even then placed no arbitrary moratorium against the establishment of a generally fair and equitable rent with immediate adjustment to reflect increased property taxes and other operating costs. This is a far cry from a statute adopted eighteen years later in the only State which still saddles the property owner with rent control. Only too true were the prophetic words of the late Mr. Justice Jackson in *Woods* v. *Miller*, 338 U. S. 138

> "I cannot accept the argument that war powers last as long as the effect and consequences of war, for if so they are permanent—as permanent as the war debts."

In *Teeval*, this Court did not pass upon the constitutional propriety of depriving a landlord of a fair return. Upon the landlord's conditional cross-application for certiorari, denial became automatic once the main petition of the State of New York had been rejected.

In foreclosing a property owner eighteen years after the start of rent control from a fair return for a full year, the learned Chief Judge likewise misconceived appellant's contentions. There can be no question that the very operation of the police power in applying rent controls automatically reduces the value of property. Thus, the subject property sold for $1,375,000 would no doubt sell for two million dollars if freed from control. Once, however, the value of property is automatically reduced by the mere existence of controls, appellant respectfully submits that it has a constitutional right to a fair return and reasonable rent on that reduced controlled value. Under such circumstances, deprivation of a fair return for a probationary moratorium even when such reasonable rent is calculated only upon the reduced value reflected by the controls, means that the statute goes too far.

Block v. *Hirsch*, 256 U. S. 135.

In sum, appellant submits that while its constitutional right to a specified return may be admeasured to a market value reflective of the controlled status of its property, it is constitutionally entitled immediately to a full return on the controlled value, namely the price at which controlled property is bought on the open market in an arms' length transaction.

The statutory scheme contemplates the fixation of a reasonable rent (see *Matter of Ackerman* v. *Weaver*, *supra*) at the expiration of the one year moratorium. We respectfully submit that if appellant has a constitutional right to

such a return at the end of the year, there is no constitutional justification for the deferment of that right for the one year period. As the late Mr. Justice Cardozo held while a member of the N. Y. Court of Appeals in *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y. 89, 95-96:

> "But the argument is that the statute is either valid or invalid at the moment of its making, and from that premise the conclusion is supposed to follow that there is a remedy for present confiscation but none for confiscation that results from changed conditions . . . The prediction must square with the facts, or be cast aside as worthless (Ex parte Young, 209 U. S. 123, 147, 148). It must square with them in one year as in another, at the beginning but equally at the end. . . .
>
> "In every statute of this kind we are to read, therefore, the implied condition. The condition is that the rates shall remain in force at such times only as their enforcement will not work denial of the right to a fair return. When the return falls below that level, the regulation is suspended.
>
> "It will seldom be important that rates have been inadequate for a day, for a week or a month. Fleeting losses may be suffered and yet the balance sheet may show a profit. Prolong the loss, however, for a year and you may reach across the danger line. It is by the average of the year that business commonly reckons its losses and its gains."

Appellant respectfully submits that this aspect of constitutional rights represents a matter of first impression which warrants a review by this Court as a substantial question.

The second basis upon which Chief Judge Desmond premised the validity of the statute was stated as follows:

"There is, of course, not only an exceedingly strong presumption of constitutionality (*Defiance Milk Products Co.* v. *DuMond*, 309 N. Y. 537, 540) but a further presumption that the Legislature has investigated for and found facts necessary to support the legislation (*Lincoln Bldg. Associates* v. *Barr*, 1 N. Y. 2d 413; *East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622, affd. 326 U. S. 230). But, besides those generalities, we have a showing that the Legislature had before it when it legislated on this subject in 1961 three different reports all made in 1961 and the minutes of a public hearing held in Albany in March of that year by the Temporary Commission (see McKinney's 1961 Legislative Annual, pp. 886-909).

"Appellant says that these reports (the so-called Herman report made to the Governor by the State Rent Administrator and the report of the Governor's five-man or 'Gaynor' committee) show that there had not been any widespread practice whereby rent increases were resulting from a series of successive sales at inflated prices with each resale used as a new base for rent calculation. *It is true that the Herman report shows, in nine years, only a few such cases and no 'widespread practice' of applications granted where there had been a prior grant on a lower sales price.* However, the five-man Committee's report points out that it is the legislative purpose to provide the Administrator with authority to curb any such cycle. The Committee recommended, therefore, the one-year delay and no-retroactivity safeguards. A month later (March 23, 1961) the Temporary Commission, a different body, reported to the Legislature as required by law (see L. 1948, ch. 675). In its report it described public hearings held earlier that month in Albany at which much testimony had been taken. It adopted some of the

five-man Committee's suggestions, including those with which we are concerned and which the Rent Administrator specifically urged at the hearing. Other speakers told of the 'alarming rate' at which apartment buildings were changing ownership at spiraled prices. The Mayor of New York City informed the Temporary Commission that 'it is increasingly the practice to sell rent-controlled real estate at inflated prices which bear little relation to the existing rent rolls or market value' and pointed out that under the then law there was nothing to prevent an increase based on that inflated price and than another sale two years later with a similar rent increase. A representative of a tenants' association showed the Committee newspaper advertisements indicating that sellers and buyers were taking advantage of this opportunity. All this shows a reasonable basis for legislative action to slow up the process—not so much to deprive owners of sales opportunities or buyers of adequate rents as to remove or prevent conditions creating inflationary spirals of prices and rents. The 'actual and manifest evil' which serves as a predicate for police power law-making can consist of a well-founded fear of future trouble. Purchases of rental property at high prices predicated on immediate rent rises could defeat the proper purposes of residential rent control. Thus, the writing of these precautions into the law was, as the Legislature saw it, reasonably necessary for the public welfare. Even if there were no record of any investigation, factual support for the legislation would be assumed by the courts to exist. And so appellant would have a heavy burden as to disputing the Legislature's fact findings made after Committee hearings and reports. Surely this record does not conclusively destroy those findings and any dispute as to underlying facts could not be presented on this

direct appeal which brings up constitutional questions only (Civ. Prac. Act, sec. 588, subd. 4)."

Appellant respectfully submits that this premise raises two substantial questions warranting Supreme Court review as follows:

(a) Can there be any rational basis to a police power enactment which is interpreted by the New York Court of Appeals as an attempt to "prevent conditions creating inflationary spirals of prices and rents" when the basic report upon which the legislation is founded admitted that:

"there is obviously little support in fact for the assertion that a widespread practice exists of repeated sales resulting in spiralling rents?" (McKinney's 1961 Session Laws *supra* at 1988)

Placing this question in its market place perspective, we ask:

"How can there be an inflationary price for a controlled commodity?"

Insofar as the learned Chief Judge has foreclosed appellant by the observation that:

"Any dispute as to underlying facts could not be presented on this direct appeal which brings up constitutional questions only"

we submit that the judgment under review stems from an order on appellee's motions dismissing the complaint in the nature of a demurrer for failure to set forth facts sufficient to constitute a cause of action. Under such circumstances, we further submit that appellant, even in the appellate courts and including this court, is entitled to a

review of the complaint from a construction most favorable to the charge of unconstitutionality.

Assuming a sales transaction meets the exacting statutory safeguards, in that it is the result of arms' length bargaining, on normal financing terms and unaffected by special circumstances, how can the price be either "high" or "inflated"?

If the charge of a "high" price is equated to 1943, the basic rent freeze date, we submit consideration would have to be given to the shrinkage in the dollar over the eighteen-year interval. On this record there is a complete absence of any such consideration. The New York Court of Appeals itself pointed out in *Matter of Realty Agency, Inc. v. Weaver*, 7 N. Y. 2d at p. 254, that even the prior statute had ruled out "situations where the price yielded a distorted reflection of value". We submit that once the statute blocks off price distortion from the bargaining process, there is no rational basis for legislation addressed at imaginary spirals of controlled rentals.

So long as rents are controlled while all items the property owner must buy to operate his real estate are free from control, it is irrational for the Legislature to adopt added restrictive amendments for the prevention of potential but concededly non-existent spirals.

(b) The asserted statutory objective as interpreted by the Chief Judge was to prevent

> "purchases of rental property at high prices predicated on immediate rent rises—based on that inflated price and then another sale two years later with a similar rent increase"

Even if the foregoing were to constitute a rational basis for legislative action—a proposition which appellant has

challenged in subdivision (a) of this question *supra*—this provides no justification for depriving appellant for the entire year of at least a return based on the equalized assessed valuation of the property of $910,000. This alternative valuation base clearly has no relevancy to alleged purchases of rental properties at so-called inflated prices predicated on "immediate rent rises." Yet, the statute in establishing the one-year moratorium precludes any fixation of a reasonable rent for the one year period irrespective whether appellant seeks the return on his purchase price or the lower equalized assessed valuation. Counsel for appellee recently interpreted this aspect of the statute. (The full text of the interpretation is reproduced in the Appendix, pp. 16a-18a.)

The pertinent provision of said interpretation quoted appellant's factual inquiry as follows:

> "The record shows that this property was purchased February 20, 1961, at a price of $1,378,000. The equalized assessed value of the property is $909,000. While the application as originally filed at a date prior to the effectiveness of the 1961 amendment, requested a 6% return on the aforesaid purchase price, the mathematics demonstrate that the property is not earning a 6% return on the aforesaid equalized assessed value.
>
> "The 1961 statute as sustained by the Court of Appeals prohibits the issuance of an order of rent adjustment earlier than February 20, 1962, or one year from the date of purchase in that the statute prescribes that 'No adjustment ordered by the Commission based upon such sales price valuation shall be effective prior to one year from the date of such sale.
>
> "It is my understanding that you interpret the statute as likewise prohibiting the issuance of such an order for this property prior to February 20, 1962, even if

the landlord requests the alternative reduced value represented by the equalized assessment. Would you kindly at your earliest convenience advise me (a) as to your interpretation concerning the foregoing question, (b) the basis for your interpretation. This letter is sent to you not necessarily because we disagree with your interpretation but merely to have the answer and reasoning for the record."

Appellee's counsel replied thereto as follows:

"Prior to the 1957 extension of the Rent Law, the Commission had the authority to adopt as the valuation base in a fair return proceeding either the equalized assessed valuation of a property or its latest bona fide sales price since March 15, 1953. The 1957 amendment to the Law eliminated that discretion and mandated the valuation base to be the latest sales price since March 15, 1953. Only in the absence of a bona fide sale since March 15, 1953, was the equalized assessed valuation to be used. These provisions were unchanged in the 1959 amendment and modified in the 1961 extension of the Law only to the extent that the use of bona fide sales was confined to those occurring on and after March 15, 1957.

"Nowhere has the Legislature ever indicated that the discretionary authority taken from the Commission since the 1957 amendment to the Law has been or should be transferred to landlords or others. On the contrary, where a bona fide sale of the property has occurred since March 15, 1957, unaffected by special circumstances which distort the sales price, it was legislatively determined that such sales price be the sole valuation base in fair return cases."

Appellant respectfully submits that the foregoing interpretation constitutes a frank concession that for a minimum one-year period a property owner is required to subsidize tenants at a rental concededly lower than a reasonable rent. This court has never approved or even considered the constitutional validity of such an arbitrary fiat which for at least one year transfers property from one citizen (a property owner) to another citizen (a tenant) without the slightest pretext for compensation. No rational basis related to the health, safety and welfare of the citizens of the State and City of New York has been advanced to justify such confiscatory action.

Price and rent controls were adopted as a matter of national wartime policy and were sustained as such by this Court (see *Bowles* v. *Willingham*, *supra*). The national policy has, however, rejected continuation of such controls in the absence of the shooting war. New York remains the only one of the 50 states continuing such controls. Under such circumstances, no warrant exists as a matter of constitutional right for depriving a New York property owner like appellant from a reasonable rent for one full year.

(2) As an adjunct to the one-year probationary moratorium, the amended statute precludes the effectiveness of an order of rent adjustment prior to the date of its issuance. Accordingly, if the processing on appellant's application is not completed by appellee prior to February 20, 1960, and orders are not issued until for example May 1, 1962, they cannot be made effective prior to such latter date of issuance even though said one-year moratorium period is passed. This merely accentuates the deprivation of property rights resulting from the amended statute. The foregoing, of course, becomes crucial in the light of the recognition by the Appellate Division of the New York Supreme

Court referred to *supra*, p. 8, in *Matter of Florell*, as to the extreme delay involved in proceedings of this type.

Concededly, appellant has not yet been damaged by this aspect of the statute. Concededly, also, appellant by virtue of filing the application prior to the statutory effective date has not been required to wait a six-month preliminary probationary period as a condition precedent to filing. Property owners who purchase properties subsequent to June 30, 1961, are, however, required to undergo such a six months condition precedent. In this case, the slow pace of Commission processing for a fair return makes completion of the application within a six months period at the very least doubtful, so that at the inception of the one-year moratorium such a property owner continues to be deprived of a reasonable rent and fair return from his tenant solely by the operation of the amended statute. Accordingly, as to such owners, the prohibition against effectuation of an order prior to its issuance threatens even greater constitutional property deprivation than to appellant. It is respectfully requested that in order to avoid multiplicity of litigation and the hardening of equities in the case of such other property owners and further to avoid the need for embarking upon a further appeal by a different owner, this Court is respectfully requested to consider the constitutional infringements of the denial of retroactivity resulting from the amended statute even though the threat to appellant may not be as severe as in the case of other property owners.

Symptomatic of the obliteration of such property owner's rights is an executive order issued by the Governor on October 29, 1961, freezing the determination of all applications based on equalized assessed valuation. (See N. Y. Times, October 30, 1961, p. 1.) Based upon said statement of the Governor, the State Rent Administrator (the Administrator of the appellee Commission) on October 30, 1961,

issued Operational Bulletin #44, reprinted in the Appendix, page 19a. Said administrative order provides for a review of all pending fair return applications and directs that:

> "Pending completion of the review, no final action on fair return applications (Sec. 33(5)) may be taken."

There is no time limit on the period for this review and accompanying stay. Unless such abatement of final action is lifted by February 20, 1961, appellant's property is further confiscated because the order, when, as and if ever issued, is not retroactive even to said one-year anniversary.

The property at 175 E. 79 St., *Rent Commission* case number AO-100708, purchased November 1, 1960, one of the first affected by the one-year rule, did not receive its orders on November 1, 1961, solely because of the foregoing delays. Denial of retroactivity under such circumstances constitutes complete confiscation.

The New York Court of Appeals gave no specific consideration to this aspect of appellant's challenge except within its general approbation of the statutory objective to "slow up the process." Such an objective which is within the purview of the one-year rule moratorium constitutes no justification for denying the constitutional right to a reasonable rent until the arduous processing period has been completed.

As Mr. Justice Oliver Wendell Holmes of this Court stated many years ago in *U. S.* v. *New York Central Railroad*, 279 U. S. 73:

> "Naturally to save its constitutionality (referring to the statute) there is coupled with the requirement to transport a provision that the railroads shall receive a reasonable compensation . . .

"The Government admits, as it must, that reasonable compensation for such required services is a constitutional right . . .

"If the claim of the railroad is just they should be paid from the moment when the application is filed. In the often quoted words of Chief Justice Shaw, 'If a pie-powder court could be called on the instant and on the spot the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other' . . . In fact the necessary investigation takes a long time, in these cases, years; *but reasonable compensation for the years thus occupied is a constitutional right of the companies no less than it is for the future . . . unless the Commission has the power assumed a part of the railroad's constitutional rights will be left in the air.*" (Italics supplied.)

No rational basis and no justification has been advanced for bypassing Mr. Justice Holmes' guiding precept. It is respectfully submitted that such departure from this Court's constitutional delimitation alone makes this an issue warranting review by this Court.

(3) The retrospective application of the amended statute to proceedings such as appellant's instituted before appellee many months prior to the effective date of the statute appears to have no federal constitutional precedent. The New York Court of Appeals relied solely on State authorities and held on this point as follows (appendix, p. 7a):

"There remains appellant's assertion that its constitutional rights were infringed when the 1961 statute was made to apply in this respect to premises purchased at an earlier date. But appellant did not have in any particular rule an interest so vested as to en

title it to keep the rule unchanged (Preston Co. v. Funkhouser, 261 N. Y. 140, Wasservogel v. Meyerowitz, 300 N. Y. 125, supra). In such situations the applicability and validity of statutes are determined as of the date we make our decision (Fruhling v. Amalgamated Housing Corp., 9 N. Y. 2d 541; Matter of Tartaglia v. McLaughlin, 297 N. Y. 419; Matter of Boardwalk & Seashore Corp. v. Murdock, 286 N. Y. 494)."

There is no record that any of the cited appeals have ever been reviewed by this Court.

The only rent control authority cited by the New York Court of Appeals for the foregoing holding is the *Wasservogel* appeal. This, however, actually implied a landlord's inherent constitutional right under these very circumstances. In *Wasservogel,* a tenant had challenged the imposition of retroactivity by the operation of the federal rent regulation. Judge Desmond, then an Associate Member of the Court, rejected the tenants' challenge in the following statement:

> "It may be that as to a landlord forced to keep a tenant, due process requires that he have court review of any claim he may make that a reduction of rent or refusal to allow an increase is confiscatory. See Yakus v. U. S., 321 U. S. 414, 431. *But no property or vested right of the statutory tenant is taken when his rent is raised*" (300 N. Y. 132). (Italics supplied.)

The only comparable situation to the one at bar arose in the so-called portal-to-portal pay cases (29 U. S. C. A. Section 251; *Anderson* v. *Mt. Clements Pottery Co.,* 328 U. S. 680). There, however, a specific Congressional Declaration of emergency was enunciated founded on the proposition that the retroactive payment of portal-to-portal pay

would bankrupt the companies involved. There is not even a scintilla of rational basis for such a finding here, and in fact there is no such emergency finding. The absence of a rational basis for this retrospective operation of the police power requires its elimination as a transparent violation of basic constitutional safeguards (see *Matter of Diamond* v. *State Rent Commission*, 198 N. Y. S. 2d 735).

We respectfully submit that the retrospective operation of the amended statute constitutes an irrational breach of appellant's constitutional rights. In sum, it is respectfully submitted that the judgment below should be reversed because the challenged provisions of the amended statute violate appellant's constitutional rights. It is further submitted that at the very least on this record a plenary consideration at this time of the constitutional issues involved herein should be allowed by this Court because the questions are substantial, of first impression in this Court and the validity of the challenged provisions is at the very best highly doubtful.

Respectfully submitted,

ROBERT S. FOUGNER
Counsel for Appellant

McLAUGHLIN & FOUGNER
ALBERT W. FRIBOURG
Of Counsel

APPENDIX

EXHIBIT 1

Opinion of Court of Appeals

COURT OF APPEALS, Clerk's Office,
Albany, July 7, 1961.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

I. L. F. Y. Co.,

Appellant,

—v.—

TEMPORARY STATE HOUSING RENT COMMISSION *et al.*,

Respondents.

Decided July 7, 1961.

Chief Judge DESMOND:

Plaintiff has taken a direct appeal from the court of first instance to this court (Civ. Prac. Act, § 588, subd. 4) asserting the invalidity under the Federal and State Constitutions of 1961 amendments (L. 1961, ch. 337) to the Emergency Housing Rent Control Law. While extending the control law (first enacted in 1946) to 1963, the Legislature modified the existing provisions which set up procedures whereby landlords may obtain maximum rent adjustments based on recent sale prices by providing that:

"No application for adjustment of maximum rent valuation based upon a sale price valuation shall be filed by the landlord under this subparagraph prior to six months from the date of such sale of the property. In addition, no adjustment ordered by the commission based upon such sales price valuation shall be effective prior to one year from the date of such sale." (Emergency Housing Rent Control Law, § 4, subd. 4, par. [a], subpar. [1], cl. [v].)

As revised in 1961, the law forbade retroactive changes in rent (§ 4, subd. 4, par. [a], subpar. [6]). The 1961 amendments were applicable to pending proceedings (§ 13).

On November 19, 1960 plaintiff-appellant contracted to purchase for $1,378,000 a rent-controlled apartment house in Manhattan. Title passed on February 20, 1961 and a week later appellant filed with the Rent Commission an application under subdivision 5 of section 33 of the State Rent and Eviction Regulations for the fixation of a reasonable rent computed as 6% return on valuation of $1,378,000 as shown by the sale price. On April 6, 1961 (this suit was commenced a few days later) and before commission action on the application was completed, the 1961 amendments were enacted. Plaintiff sues for a declaration that they are unconstitutional as to it in that an increase based on purchase price of this property cannot be obtained until at least one year from the purchase date and that any such increase will be prospective only even though by the law as it existed when plaintiff bought the building such increases were retroactive to the date of the filing of the application but for not more than six months (see L. 1957, ch. 755; L. 1959, ch. 695).

Some history should be recalled. During part of the time (up to 1948) when residential rent control was governed by Federal statutes, retroactive increases were not permitted (see *Wasservogel* v. *Meyerowitz*, 300 N. Y. 125). In 1950

the State took over and from 1950 to 1951 there was a temporary freeze of New York City rents pending submission of a new State plan (see L. 1950, ch. 250). The 1951 State act (see chapter 443 of that year) provided for nonretroactive fixation of maximum rents at rates to produce a minimum return on property value but defined value generally as equivalent to the equalized tax assessment. Discretion, however, was by the 1951 law given to the State Administrator to adopt a valuation other than the adjusted assessment in cases where there had been a sale of the property during the year next preceding March 15, 1951 (see, as to discretion, *Matter of Realty Agency* v. *Weaver*, 7 N. Y. 2d 249, 252). The 1953 statute (see chapters 320 and 321 of that year) extended residential rent control to 1955 but broadened the Administrator's powers so that he might use sale price as value where there had been a bona fide sale between March 15, 1951 and the date of the application. These increases, however, were not to be retroactive. While the 1953 statute was in effect, the administrative practice (confirmed by court decisions; see, for instance, *Matter of Wile* v. *McGoldrick*, 286 App. Div. 826, motion for leave to appeal denied 309 N. Y. 1033) was to use the purchase price as a base unless special circumstances had affected the price.

Appellant stresses the fact that the courts (see *Matter of 340 East 57th St. Corp.* v. *Weaver*, 2 N. Y. 2d 799, and *Matter of Florell Equities* v. *Weaver*, 2 N. Y. 2d 982) held entirely invalid a commission regulation adopted while the 1955 statute (identical with the 1953 act) was in effect and which prohibited the use of a sale price as the valuation base in any instance where the property had been awarded an increase in the past, and which further prohibited the filing of an application for such an adjustment until the applicant

had been owner for a year. That regulation was, however, stricken not for unconstitutionality but because it was unauthorized by statute and contrary to any ascertainable legislative intent, and so was a usurpation by the commission of legislative power.

In 1957 for the first time the Legislature dealt with "resale prices" and the fact or danger of spiraling prices on successive sales. While the use of a bona fide sales price was made mandatory instead of discretionary, the new act (L. 1957, ch. 755) gave the Rent Administrator discretion where there had been more than one sale within two years prior to the application to "disregard the most recent of sales only if a prior sale within such two-year period was adopted as the valuation of the property" in a rent-increase proceeding. The legislative authorization to use not more than one sale in each two-year period was made in response to a recommendation by the Temporary Commission to Study Rents and Rental Conditions which had reported that the Administrator needed "authority to curb any cycle of successive sales followed by applications for adjustments" (see report, N. Y. Legis. Doc., 1957, No. 22, p. 23).

Turning now to the disputed 1961 additions, we first examine into the validity of the one-year delay and no-retroactivity rules. If these are found not to be intrinsically invalid, we must move to an inquiry as to whether they may constitutionally be made applicable to a sale arranged or consummated before the effective date of the 1961 amendments.

Appellant does not dispute the continuance of the housing emergency which is the predicate for these housing rent control laws. It cannot deny that prohibitions against rent increases may in an emergency be constitutional al-

though they reduce the value of the property regulated and deprive its owner of what otherwise would be considered a fair return (see *Bowles* v. *Willingham*, 321 U. S. 503, 517; *Terral Co.* v. *Stern*, 301 N. Y. 346, 362, cert. den. 340 U. S. 876). Appellant does suggest that the 1961 Legislature acted illegally when it added new "police power restraints" to the earlier controls without any new finding as to "intensification of emergency" warranting the increased restrictions. We know of no requirement for such a new declaration or description of conditions requiring tightening of controls. The real question on this branch of the case is whether there was anything before the Legislature justifying the year-delay and nonretroactivity clauses added in 1961.

There is, of course, not only an exceedingly strong presumption of constitutionality (*Defiance Milk Prods. Co.* v. *Du Mond*, 309 N. Y. 537, 540) but a further presumption that the Legislature has investigated for and found facts necessary to support the legislation (*Lincoln Bldg. Associates* v. *Barr*, 1 N. Y. 2d 413; *East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622, affd. 326 U. S. 230). But, besides those generalities, we have a showing that the Legislature had before it when it legislated on this subject in 1961 three different reports all made in 1961 and the minutes of a public hearing held in Albany in March of that year by the Temporary Commission (see "Survey Report on the Rental and Housing Market" of the Temporary State Housing Rent Commission, Jan., 1961; Report of Governor's Special Committee, Feb. 24, 1961; 1961 Report of the Temporary Commission to Study Rents and Rental Conditions, March 23, 1961 [N. Y. Legis. Doc., 1961, No. 23]).

Appellant says that these reports (the so-called Herman report made to the Governor by the State Rent Administra-

tor and the report of the Governor's five-man or "Gaynor" committee) show that there had not been any widespread practice whereby rent increases were resulting from a series of successive sales at inflated prices with each resale used as a new base for rent calculation. It is true that the Herman report shows, in nine years, only a few such cases and no "widespread practice" of applications granted where there had been a prior grant on a lower sales price. However, the five-man committee's report points out that it is the legislative purpose to provide the Administrator with authority to curb any such cycle. The committee recommended, therefore, the one year delay and no-retroactivity safeguards. A month later (March 23, 1961) the Temporary Commission, a different body, reported to the Legislature as required by law (see L. 1948, ch. 675). In its report (N. Y. Legis. Doc., 1961, No. 23) it described public hearings held earlier that month in Albany at which much testimony had been taken. It adopted some of the five-man committee's suggestions, including those with which we are concerned and which the Rent Administrator specifically urged at the hearing. Other speakers told of the "alarming rate" at which apartment buildings were changing ownership at spiraled prices. The Mayor of New York City informed the Temporary Commission that "it is increasingly the practice to sell rent-controlled real estate at inflated prices which bear little relation to the existing rent rolls or market value" and pointed out that under the then law there was nothing to prevent an increase based on that inflated price and then another sale two years later with a similar rent increase. A representative of a tenants' association showed the committee newspaper advertisements indicating that sellers and buyers were taking advantage of this opportunity. All this shows a reasonable basis for

legislative action to slow up the process—not so much to deprive owners of sales opportunities or buyers of adequate rents as to remove or prevent conditions creating inflationary spirals of prices and rents. The "actual and manifest evil" which serves as a predicate for police power law-making can consist of a well-founded fear of future trouble. Purchases of rental property at high prices predicated on immediate rent rises could defeat the proper purposes of residential rent control. Thus, the writing of these precautions into the law was, as the Legislature saw it, reasonably necessary for the public welfare. Even if there were no record of any investigation, factual support for the legislation would be assumed by the courts to exist. And so appellant would have a heavy burden as to disputing the Legislature's fact findings made after committee hearings and reports. Surely this record does not conclusively destroy those findings and any dispute as to underlying facts could not be presented on this direct appeal which brings up constitutional questions only (Civ. Prac. Act, § 588, subd. 4).

There remains appellant's assertion that its constitutional rights were infringed when the 1961 statute was made to apply in this respect to premises purchased at an earlier date. But appellant did not have in any particular rule an interest so vested as to entitle it to keep the rule unchanged (*Preston Co.* v. *Funkhouser*, 261 N. Y. 140; *Wasservogel* v. *Meyerowitz*, 300 N. Y. 125, *supra*). In such situations the applicability and validity of statutes are determined as of the date we make our decision (*Fruhling* v. *Amalgamated Housing Corp.*, 9 N. Y. 2d 541; *Matter of Tartaglia* v. *McLaughlin*, 297 N. Y. 419; *Matter of Boardwalk & Seashore Corp.* v. *Murdock*, 286 N. Y. 494).

The judgment should be affirmed, with costs.

Judges Dye, Fuld, Froessel, Van Voorhis, Burke and Foster concur.

Judgment affirmed.

EXHIBIT 2

The Opinion at Special Term of Judge Greenberg

I. L. F. Y. Co. v. Temporary State Housing Rent Commission—Defendant, the Temporary State Housing Rent Commission, and, by separate motion, the co-defendant move for dismissal of the complaint pursuant to Rule 106 (4). The Emergency Housing Rent Control Law (Chapter 274 of the Laws of 1946, as amended) was further amended (Chapter 755 of the Laws of 1957, as amended by Chapter 695 of the Laws of 1959) and provided for mandatory individual adjustment of maximum rent where the rental income yields a net annual return of less than 6 per cent. per annum of the valuation of the property based upon a bona fide sale of the property within a stated period as defined. Complaint is made of still further amendment by action of the 1961 Legislature (Chapter 337 of the Laws of 1961) in extending the Act to June 30, 1963. By such amendment, it is provided that "No application for adjustment of maximum rent based upon a sales price valuation shall be filed by the landlord under this sub-paragraph prior to six months from the date of such sale of the property," and further that "In addition, no adjustment ordered by the commission based upon such sales price valuation shall be effective prior to one year from the date of such sale." In three causes of action, plaintiff urges unconstitutionality in that it cannot obtain an increase based on the purchase price until one year from the date of its purchase, that orders of adjustment when issued are prospective only, and the amended statute applies to applications retrospectively. Claim of unconstitutionality is based upon the contention that the Legislature failed to set forth additional findings of emergency necessitating intervention of the police power

warranting such amendments and they are therefore without support. In Teeval Co., Inc., v. Stern (301 N. Y. 346 [1950 certiorari denied 340 U. S. 876]) the court stated: "In the view of the plaintiff landlord, the State rent control statute will deprive it of a 'fair return' on its investment. If that point can be considered at all on this direct appeal (see Lapchak v. Baker, 298 N. Y. 89, 80 N. E. 2d 751, supra), the answer is plain. The state rent control statute was enacted to meet a passing emergency. It does not contemplate a taking of the property of any landlord. Even though it may, now and then, compel an owner to operate his real property at a loss, the statute is not for that reason to be condemned as an arbitrary use of the police power (Bowles v. Willingham, 321 U. S. 503, 516-519, 64 S. Ct. 641, 88 L. Ed. 892)." No challenge is raised to the continuing emergency warranting police power intervention, but rather the challenge is directed to the failure to made additional legislative findings as to the particular amendment. The power to legislate with respect to the emergency is not spent merely because the Legislature has once before mandated upon the particular subject. The motion is granted and the complaint is dismissed.

I. L. F. Y. Co. v. Temporary State Housing Rent Comm'n —Defendant Meehan moves for dismissal of the complaint pursuant to Rule 106(4). The motion is granted and the complaint is dismissed. See disposition of companion motion published simultaneously herewith.

EXHIBIT 3

Challenged Provisions of the Statute

Pertinent provisions of the Emergency Housing Rent Control Law of the State of New York, as amended (Chapter 337, Laws of 1961)

Subdivision 4(a)(1) of Section 4 of the Emergency Housing Rent Control Law as amended on April 29, 1961, provides:

> "No application for adjustment of maximum rent based upon sales price valuation shall be filed by the landlord under this sub-paragraph prior to six months from the date of such sale of the property."

Said subdivision further provides that:

> "In addition no adjustment ordered by the commission based upon such sales price valuation shall be effective prior to one year from the date of such sale."

Subdivision 4.6 of Section 4 of the amended statute provides as follows:

> "No increase or decrease in maximum rent shall be effective prior to the date on which the order therefor is issued."

Section 13 of the statute and of the amended statute provides in part as follows:

> "Pending proceedings. The commission may provide for and authorize the continued processing of any application or proceeding pending at the time this act becomes effective; provided, however, that final determination of the commission in such pending application or proceeding shall not be inconsistent with this act."

EXHIBIT 4

Order of Remittitur

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

Remittitur, July 7, 1961

No. 183

I. L. F. Y. Co.,

Appellant,

—against—

THE TEMPORARY STATE HOUSING RENT COMMISSION & ANO.,

Respondents.

BE IT REMEMBERED, That on the 13th day of May in the year of our Lord one thousand nine hundred and sixty-one, I. L. F. Y. Co., the appellant—in this cause, came here unto the Court of Appeals, by McLaughlin & Fougner, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Supreme Court,

Order of Remittitur

New York County, and the Temporary State Housing Rent Commission & ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Harold Zucker, & ano., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Robert S. Fougner, of counsel for the appellant, and by Mr. Harold Zucker, of counsel for the respondent Commission, no appearance for the respondent Jones, and argued by Mathias L. Spiegel, of counsel for the Attorney General pursuant to Section 71 of the Executive Law, and after due deliberation had thereon, did order and adjudge that the judgment appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

EXHIBIT 5

Order on Remittitur

At a Special Term, Part II of the Supreme Court of New York County, held at the County Courthouse, Pearl & Centre Streets, in the Borough of Manhattan, City of New York, on the 28 day of September, 1961.

Present:

HON. SAUL S. STREIT

Justice.

I. L. F. Y. Co.,

Plaintiff-Appellant,

—against—

THE TEMPORARY STATE HOUSING RENT COMMISSION and MARY ALICE JONES,

Defendants-Respondents.

Plaintiff-appellant, having appealed to the Court of Appeals from a Judgment of the Supreme Court, New York County, entered on May 5, 1961; and said appeal having been duly heard by the Court of Appeals, and that Court, in an order dated July 7, 1961 and entered in the Office of the Clerk of the Court of Appeals on July 7, 1961, having ordered that the judgment appealed from be affirmed, with costs.

Order on Remittitur

Now, upon reading and filing a certified copy of the Order of the Court of Appeals and on motion of Harold Zucker, Counsel to the State Rent Commission (Edward V. Alfieri, Deputy Counsel of Counsel) it is

ORDERED, that the Order of the Court of Appeals be, and the same hereby is made the Order of this Court.

ENTER:

S. S. S.

EXHIBIT 6

Interpretative Letter of the Temporary State Housing Rent Commission (Appellee)

(Emblem)

STATE OF NEW YORK
TEMPORARY STATE HOUSING
RENT COMMISSION
280 BROADWAY
NEW YORK 7, NEW YORK

Telephone: BArclay 7-1616

HAROLD ZUCKER
COUNSEL AND
DEPUTY ADMINISTRATOR

October 23, 1961

Robert S. Fougner, Esq.
c/o McLaughlin & Fougner,
17 East 49th Street
New York 17, New York

RE: I.L.F.Y. Co. v. Rent Commission
Premises: 320 East 57th Street
Docket AO 101095

Dear Mr. Fougner:

This will acknowledge receipt of your letter dated September 19, 1961, with reference to the above matter, in which you state:

"This letter is addressed to you merely for purposes of clarifying your interpretation of Chapter 337, Laws

Interpretative Letter of the Temporary State Housing Rent Commission (Appellate)

of 1961, as it applies to the fair return valuation on the property involved in the above case.

The record shows that this property was purchased February 20, 1961, at a price of $1,378,000. The equalized assessed value of the property is $909,000. While the application as originally filed at a date prior to the effectiveness of the 1961 amendment, requested a 6% return on the aforesaid purchase price, the mathematics demonstrate that the property is not earning a 6% return on the aforesaid equalized assessed value. The 1961 statute as sustained by the Court of Appeals prohibits the issuance of an order of rent adjustment earlier than February 20, 1962, or one year from the date of purchase in that the statute prescribes that 'No adjustment ordered by the Commission based upon such sales price valuation shall be effective prior to one year from the date of such sale.'

It is my understanding that you interpret the statute as likewise prohibiting the issuance of such an order for this property prior to February 20, 1962, even if the landlord requests the alternative reduced value represented by the equalized assessment. Would you kindly at your earliest convenience advise me (a) as to your interpretation concerning the foregoing question, (b) the basis for your interpretation. This letter is sent to you not necessarily because we disagree with your interpretation but merely to have the answer and reasoning for the record."

Prior to the 1957 extension of the Rent Law, the Commission had the authority to adopt as the valuation base in a fair return proceeding either the equalized assessed

valuation of a property or its latest bona fide sales price since March 15, 1953. The 1957 amendment to the Law eliminated that discretion and mandated the valuation base to be the latest sales price since March 15, 1953. Only in the absence of a bona fide sale since March 15, 1953, was the equalized assessed valuation to be used. These provisions were unchanged in the 1959 amendment and modified in the 1961 extension of the Law only to the extent that the use of a bona fide sales was confined to those occurring on and after March 15, 1957.

Nowhere has the Legislature ever indicated that the discretionary authority taken from the Commission since the 1957, unaffected by special circumstances which distort the ferred to landlords or others. On the contrary, where a bona fide sale of the property has occurred since March 15, 1957 amendment to the Law has been or should be transsales price, it was legislatively determined that such sales price be the sole valuation base in fair return cases.

I trust the above fully answers your inquiry.

Very truly yours,

/s/ HAROLD ZUCKER
HAROLD ZUCKER
Counsel

HZ/jb

EXHIBIT 7

Appellee's Operational Bulletin Staying Final Action on Fair Return Cases

STATE OF NEW YORK
TEMPORARY STATE HOUSING
RENT COMMISSION
280 BROADWAY
NEW YORK 7, NEW YORK

October 30, 1961

Operational Bulletin No. ~~44~~—Statement by Governor Rockefeller

Appended hereto is the Statement by Governor Nelson A. Rockefeller released Sunday, October 29, 1961, on the subject of rent control and the Commission's review of all applications under the fair return provision of the Law to determine the effect of the 1961 equalization rates upon tenants.

Pending completion of the review, no final action on fair return applications [§ 33(5)] may be taken.

ROBERT E. HERMAN
Commissioner and
State Rent Administrator

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JAN 10 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 569

I. L. F. Y. CO.,

Appellant,

against

THE TEMPORARY STATE HOUSING RENT COMMISSION and MARY ALICE JONES,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

HAROLD ZUCKER,
Attorney for Appellee,
State Rent Commission,
280 Broadway,
New York 7, New York.

EDWARD V. ALFIERI,
Deputy Counsel,
of Counsel,
on the brief.

349 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 569

I. L. F. Y. Co.,

Appellant,

against

THE TEMPORARY STATE HOUSING RENT COMMISSION and MARY ALICE JONES,

Appellees.

On Appeal From The Court Of Appeals Of The State of New York

MOTION TO DISMISS OR AFFIRM

Appellee, the New York State Rent Administrator, pursuant to Rule 16 of the revised rules of the Supreme Court of the United States, moves that the appeal taken herein from the final judgment of the New York Court of Appeals be dismissed or, in the alternative, that the judgment appealed from be affirmed.

Opinions Below

The Supreme Court, New York County, wrote a memorandum opinion (N.Y.L.J. May 3, 1961, p. 13, c. 7, 8). Pur-

suant to Sec. 588, subd. 4 of the Civ. Prac. Act, plaintiff took a direct appeal to the New York Court of Appeals which court wrote an opinion reported in 10 N. Y. 2d 263.

Jurisdiction

Jurisdiction is invoked under Section 28 U. S. Code, Section 1257(2).

Questions Presented

Simply stated, the questions which the appellant seeks to bring before the Court may be reduced to the following:

a) Do the challenged amendments to the Law have a reasonable relation to the execution of a concededly lawful purpose;

b) Did the appellant have a vested interest in the Law prior to its amendment so as to entitle it to have the Law remain unaltered, or, in the alternative, to have any amendments to the Law made inapplicable to it.

Statement

This proceeding comes before this Court by virtue of a Notice of Appeal filed from a final order and judgment of the New York Court of Appeals made on July 17, 1961. Involved is a constitutional challenge against two of the amendments in the 1961 extension of the New York State Emergency Housing Rent Control Law and the retention of the statutory provision that the law as amended be applied to pending administrative proceedings. (For text of challenged provisions, see Appendix, p. 30.)

Under the prior statute, a purchaser of controlled housing could have applied immediately for building-wide rent increases based on his own purchase price. Increases so

granted would be effective no later than two months from the filing date of the application or six months prior to the order granting the increases, whichever was the later.

As amended, the law requires a purchaser to own the property at least six months before application for a "fair return" increase may be made. Moreover, no order granting an increase based on such sales price may be effective until one year from the date of purchase.

In addition, there was deleted from the law a provision, inserted four years before, authorizing rent adjustment orders to be made effective retroactively.

As noted in the opinion of the Court of Appeals (Appendix, pp. 21-27):

> "Appellant does not dispute the continuance of the housing emergency which is the predicate for these housing rent control laws. It cannot deny that prohibitions against rent increases may in an emergency be constitutional although they reduce the value of the property regulated and deprive its owner of what otherwise would be considered a fair return (see *Bowles* v. *Willingham*, 321 U. S. 503, 517; *Teeval Co.* v. *Stern*, 301 N. Y. 346, 362, cert. den. 340 U. S. 876)."

In dismissing the appeal, the Court held that apart from "an exceedingly strong presumption of constitutionality" and "a further presumption that the Legislature has investigated for and found facts necessary to support the legislation", there was an affirmative presentation of facts to the Legislature which "shows a reasonable basis for legislative action • • •. Thus, the writing of these precautions into the law was, as the Legislature saw it, reasonably necessary for the public welfare." With respect to appellant's assertion that its constitutional rights were infringed when the 1961 statute was made applicable to its earlier purchase, the Court held that "ap-

pellant did not have in any particular rule an interest so vested as to entitle it to keep the rule unchanged."

Manifestly, such rulings present no substantial Federal questions. Indeed, the challenged amendments fall completely within the special competence of the New York State Legislature to enact statutory procedures reasonably adapted to a recognized and undisputed public need. This Court repeatedly has denied certiorari or relief on the merits in substantially identical circumstances. This appeal, too, should be dismissed or, in the alternative, affirmed. (*Patterson* v. *Stanolind Co.*, 305 U. S. 376, 379; *Levering & Garrigues Co.* v. *Marrin*, 289 U. S. 103, 105, 106.)

Argument

1. Legislative Background

Some of the facts of which this Court may readily take judicial notice and upon which the Legislature based its determination to adopt the challenged remedial legislation are to be found in four separate comprehensive documents:

(a) The Survey Report on the Rental and Housing Market dated January 1961* (hereinafter referred to as The Herman Survey Report);

(b) The Report of the Five Man Committee dated February 24, 1961 (McKinney's 1961 Session Laws of New York, p. 1985 et seq.);

(c) The Minutes of the public hearings held on March 2, and March 3, 1961 by the New York State Temporary Commission to Study Rents and Rental Conditions; and

---

* For the Court's convenience, copies are submitted with the motion.

(d) The Report of the New York State Temporary Commission to Study Rents and Rental Conditions, dated March 23, 1961 (McKinney's 1961 Session Laws of New York, p. 1971 et seq.).

However, before turning to the pertinent parts of these documents, brief reference first will be made to the rent control legislation in New York State which preceded the enactment of the amendments here challenged.

A. Sales Price

Until 1957, the Emergency Housing Rent Control Law was silent regarding the use of a resale price as the valuation base in fair return proceedings for building-wide rent increases. Instead, there was a general provision vesting the State Rent Administrator with discretion to adopt as a property's valuation any bona fide sales price since March 15, 1951, in lieu of its equalized assessed value [e.g., Laws of New York, 1953, ch. 320, 321, § 4(4)(a)(1)]. In the 1957 re-enactment of the rent law, the Legislature eliminated that discretionary authority and mandated that the primary valuation of a property was its most recent bona fide sales price which met certain other requirements not here relevant. In so doing, however, it took express cognizance of trends in the resale of controlled housing which warranted the imposition of certain safeguards. Specifically, to prevent the possible spiralling of rents resulting from the use of a repeat sales price immediately following the granting of rent increases based upon an earlier sales price, the Legislature reserved to the Administrator the following discretion:

"... where there has been more than one such bona fide sale within a period of two years prior to the date of the filing of such application the commission may disregard the most recent of such sales only if a prior sale within such two-year period was adopted as the

valuation of the property in a proceeding under this subparagraph." [Laws of New York, 1957, ch. 755, §4(4)(a)(1)]

In recommending this change, the Temporary Commission to Study Rents and Rental Conditions said:

> ". . . such amendment will require the use of recent bona fide sales prices as a more accurate reflection of value in fair return applications and which will, through the two-year provision, provide the Administrator with authority to curb any cycle of successive sales followed by applications for adjustments." (McKinney's 1957 Session Laws of New York, p. 1545)

B. Retroactivity

Under the Federal rent program, orders increasing maximum rents originally were made effective as of the date of issuance. Orders decreasing maximum rents were made effective as of the next rent payment date. Commencing January 1948, the Federal regulations were amended to provide that orders increasing maximum rents would be effective as of the date of filing the landlord's petition (Temporary State Housing Rent Commission 1950 Survey of Residential Rents and Rental Conditions in the State of New York, pp. 285, 286).

In its 1950 report recommending the enactment of a State rent control law to supersede the co-existing Federal and City rent laws, the Temporary Commission to Study Rents and Rental Conditions said:

> "The feeble and apparently insincere efforts to administer or enforce the law by the Office of Housing Expediter were viewed with suspicion by the Commission and by tenants when more than 13,000 retroactive so-called 'fair net operating income' increases were granted suddenly some of which were dated back approximately two years.

"The din raised by protesting tenants caused widespread adverse newspaper comment. Many aroused tenants who were confronted with the necessity of paying substantial accumulative increases without any prior warning or notice, organized themselves into protesting groups." (McKinney's 1950 Session Laws of New York, p. 597)

Consequently, from the inception of State rent control in 1950 and until 1957, the statute provided for prospective application only of all rent adjustment orders (e.g., Laws of New York, 1955, ch. 685, § 4, subd. 6).

However, in renewing rent control in 1957, the Legislature took cognizance of the Rent Agency's increasing workload and backlog of applications which was causing an ever increasing time interval between the filing and disposition of such applications. Primarily because a survey of pending fair net return cases presaged a worsening situation, it was the legislative judgment to permit retroactivity for a maximum of six months provided such period did not antedate two months from the filing of the application. The Temporary Commission to Study Rents and Rental Conditions recommended this modification in the following language:

"Another amendment is intended to expedite the processing of fair return applications, and applications by tenants for rent reductions for failure by landlords to maintain services. This amendment will make orders for adjustments effective not later than two months after the application is filed. The amendment recommended for adoption will, however, limit retroactive effect on orders to a maximum of six months. It will permit a tenant to pay arrearages in monthly installments and is similar to the policy now followed by the Administrator where he revives an order on protest." (McKinney's 1957 Session Laws of New York, p. 1545)

Unfortunately, and undoubtedly as a result of a still increasing case load of fair return applications, no substantial progress was made during the ensuing two years toward reducing the time interval involved in processing these cases. Recognition of this fact was contained in Governor Rockefeller's Special Message to the Legislature on February 9, 1959, wherein he stated:

> "4. Administrative procedures and regulations. The procedures and regulations of rent control are involved and frequently burdensome for both tenants and landlords. It is essential that these procedures and regulations be made to operate as reasonably, as simply and as expeditiously as possible.
>
> "Accordingly, the State Rent Administrator will carefully review existing administrative procedures and regulations to achieve greater simplicity, fairness and operational efficiency." (McKinney's 1959 Session Laws of New York, p. 1704)

While awaiting the outcome of the administrative action, the Legislature renewed rent control in 1959 for two years without change in the statutory provisions with which we are here concerned.

Since 1959, the State Rent Administrator has initiated a number of new procedures and techniques in fair return cases. While no useful purpose would be served at this time by detailing the nature and effect of these modifications, it should be noted that they have more than halted the growing time lag previously experienced. Moreover, in reinstating prospectivity as provided prior to the 1957 amendment, the Legislature acted with full knowledge of these improved procedures as well as with full approval of the State Rent Administrator and the Temporary Commission to Study Rents and Rental Conditions.

C. The Herman Survey Report

On January 19, 1961, State Rent Administrator Robert E. Herman transmitted to Governor Rockefeller the Survey Report on the Rental and Housing Market. As stated in the Preface (p. 2):

> "This report is submitted in response to that directive (in the Special Message) and is designed to assist the Governor and the Legislature in their consideration of the future course of rent control."

As was expressly noted in the subsequent reports of the Governor's Five Man Committee and the Temporary Commission to Study Rents and Rental Conditions, this 71-page document, consisting of narrative and charts, was heavily relied upon in formulating the recommendations made by both of these committees.

D. The Five Man Committee Report

On November 4, 1960, Governor Rockefeller appointed a special five man committee to study and evaluate two separate and distinct phases of the residential rent control law. Pertinent to this appeal is the one involving the provisions governing the sales price basis in fair return proceedings which, as the Special Committee noted "(has) been the subject of widespread interest and discussion." (McKinney's 1961 Session Laws of New York, p. 1986)

Headed by the State Housing Commissioner, the Special Committee included State Rent Administrator Herman, the Chairman of the Temporary Commission to Study Rents and Rental Conditions, the Chairman of the Joint Legislative Committee on Housing and Multiple Dwellings, and the Deputy State Industrial Commissioner.

With respect to sales price evaluation, the Special Committee stated:

> "During the course of this Committee's conferences, claims were made that a widespread practice had developed whereby rent controlled buildings were being sold and resold at inflated prices, and that each buyer was obtaining rent increases based on his own purchase price." (McKinney's 1961 Session Laws of New York, p. 1987)

On the basis of its own investigation and the Herman Survey Report, the Committee found:

> ". . . There is obviously little support in fact for the assertion that a 'widespread practice' exists of 'repeated sales' resulting in 'spiralling rents'.
>
> "This is not to say, however, that other abuses and inequities have not arisen under the present statutory provision with respect to the use of a sales price evaluation." (McKinney's 1961 Session Laws of New York, p. 1988)

It was to curb these "other abuses" that the Committee recommended the package of amendments to the statute. The stated purpose, was "to check any untoward trend toward the use of an inflated sales price as a basis for obtaining a rent increase." (McKinney's 1961 Session Laws of New York, p. 1987)

With respect to the one statutory amendment here challenged, the Committee stated:

> "(1) The Law Should Be Amended To Require One Year's Ownership By The Landlord Prior To The Effective Date Of Any Rent Adjustments Based On Sales Price. And to Prohibit Filing For Six Months Following The Date Of Such Ownership And To Eliminate The Present Requirement Of Up To Six Month Retroactive Rent Payments By Tenants.

"The law should be amended to require that where there has been a bona fide sale of property, no rent adjustment under the fair return provision of the law based upon the sales price shall be effective until after one year from the date of the sale, and that the landlord be prohibited from filing his application for a rent adjustment based upon such sales price until six months following date of the sale. The adoption of these recommendations would also obviate the present requirement that tenants make retroactive rent payments for a period as long as six months—a requirement which has proved burdensome and complex for both tenants and landlords." (McKinney's 1961 Session Laws of New York, pp. 1989, 1990)

E. The Legislative Public Hearings

Following widely circulated notice to the public, the Temporary Commission to Study Rents and Rental Conditions conducted hearings on March 2, and March 3, 1961 on the need to continue or modify residential rent control. As noted in the Commission's Report:

"At the last public hearing many of those who came to Albany to be heard were unable to be heard because of the necessity of meeting bus, train and plane reservations. It was decided, therefore, to hold the hearing on different days, to give an entire day to landlords and give equal time to tenants to express their views. March 2, 1961 was announced as the day reserved for tenants. The place of the hearing was Chancellor's Hall in the Education Building in Albany directly opposite to the Capitol. The hearing began promptly at 1:00 o'clock and continued without recess until 7:00 P. M. More than a thousand individuals overflowed the Hall. Thirty-nine speakers appeared for themselves or as representatives during the six hours

of the hearing. Many others filed briefs. The transcript of this phase of the hearing covers 173 pages.

"One of the early appearances was that of the State Rent Commissioner and Administrator . . ." (McKinney's 1961 Session Laws of New York, p. 1976)

In a prepared statement which was read into the record, Administrator Herman said with reference to the areas here pertinent:

"On January 19, 1961, I submitted my Report on the Survey of the Rental and Housing Market. This survey, called for by Governor Rockefeller, in his Special Message to the Legislature of February 9, 1959, in my opinion, provides a sound basis of fact upon which to determine the future course of residential rent control, and its continued administration with fairness and equity to both landlords and tenants.

• • • • •

"III. *Recommendations of Governor's Committee on Sales Price and Eviction Controls*

The Law should be amended to incorporate the specific recommendations of the Governor's Five Member Special Committee, as submitted on February 27, 1961, with respect to both the Sales Price Valuation of properties in applications for rent increases under the Fair Return provision, and Eviction Controls in demolition applications to construct additional housing. These recommendations call for:

"A. *Sales Price Valuation in 'Fair Return' Cases*

(1) Amending the law to require one year's ownership by the landlord before the granting of any rent adjustment based on his sales price,

to prohibit the filing of an application for such adjustment prior to six months of such ownership, and to eliminate the present requirement of up to six months retroactive rent payments by tenants.

(2) Incorporating specific statutory criteria designed to prevent possible abuses through abnormal financing.

(3) Advancing the sales price date to bar the use of 'old' sales prices which no longer reflect current value.

• • • • •

"IV. *Elimination of Retroactivity*

The Law should be amended to eliminate retroactivity in orders adjusting maximum rents and to provide that such orders be effective not earlier than the date of issuance.

Because of delays in processing fair return applications, the Law was amended in 1957 to provide for retroactive payments of rent adjustments. Recent administrative improvements and other operating efficiencies have now reduced the need for this requirement. In addition, this recommendation conforms with the findings of the Governor's Five Member Special Committee with respect to applications for rent adjustments under the sales price provision of the Law. Such remedial action would recognize the burdens and complexities of retroactivity in orders which have been experienced by both tenants and landlords."

(Transcript of Hearing, March 2, 1961, pp. 9-12)

The Administrator was both preceded and followed by many legislators who specially attended the hearing to make their views known to the Commission members.

The following excerpts express the unanimous tenor of their views and are typical of the statements they all made:

> "Apartment buildings are changing hands at an alarming rate and at such spiralled prices that a six-story elevator apartment building built about 25 or 30 years ago which had a value four years ago of 6 times the annual rent is now being sold for 11 times the annual rent. Almost double and why not? The tenants are stuck with the tab." (Transcript of Hearing, March 2, 1961, p. 3)

> "It is obvious that since the Rent Commission determines a fair net return based on the purchase price, then the landlord does not care what the purchase price may be because the Rent Commission guarantees him an 8% return." (Transcript of Hearing, March 2, 1961, p. 4)

> "Now another section of the Law supposedly designed to grant legitimate landlords plagued by increased costs a fair rent increase, has become instead a lure to unconscionable speculators. These operators purchase buildings at deliberately inflated prices, knowing that they can pass their bad bargain onto the tenants."

> (Transcript of Hearing, March 2, 1961, pp. 96-97)

The Mayor of the City of New York had a prepared statement read for him in which he said:

> "And it is increasingly the practice to sell rent-controlled real estate at inflated prices which bear little relation to the existing rent rolls or market value. When this happens, the owner can apply for a hardship rent increase the day after he buys the property, and in some cases this has resulted in increases up to

40%, to be spread out at the rate of 15% a year until the 40% is reached. And there is nothing to stop another sale two years later at another inflated price, so that the same cycle can start all over again, even before the previous rent increase has gone fully into effect." (Transcript of Hearing, March 2, 1961, p. 68)

Holding aloft offerings of property for sale, the spokesman for the Tenants' Association of New York concluded his presentation thusly:

"Now, I also have proof here how they are advertising properties. 'Owner's bills and records will be turned over to purchaser for hardship application.' The attorneys representing these speculators go to the Rent Commission and they tell the hearing officer, 'Get us all the properties you can like this, we will buy them from you, they are bargains.'" (Transcript of Hearing, March 2, 1961, p. 42)

F. The 1961 Legislative Commission Report

In making its recommendations to the Legislature, the Temporary Commission to Study Rents and Rental Conditions relied upon and quoted extensively from the Herman Survey Report, the Five Man Committee Report and its own public hearings. As stated in its Report:

"It was only after careful consideration of all the testimony that the Commission arrived at its determination to make the recommendations hereinafter set forth." (McKinney's 1961 Session Laws, of New York p. 1977)

The recommendations therein made were precisely those recommended by State Rent Administrator Herman and the Five Man Committee. All were thereafter adopted by the Legislature, including the amendments here under attack.

It is of interest to note that the Minority Report differed in this regard only to the extent that even more stringent restrictions were demanded (see McKinney's 1961 Session Laws of New York, p. 1982).

2. No Substantial Federal Question is Presented

The preceding references to the massive data considered by the Legislature overwhelmingly demonstrated the need "to check any untoward trend toward the use of an inflated sales price as a basis for obtaining a rent increase" (McKinney's 1961 Session Laws of New York, p. 1987).

All this evidence clearly pointed in one direction: More and more emphasis was being placed by both buyer and seller on the fact that, immediately following transfer of title, an application could be filed demanding building-wide rent increases based upon a six per cent return on the sale price, with the increases becoming effective two months thereafter.

Indeed, as was stated at the public hearing—and a matter of common knowledge in the rent control field—it was becoming more and more commonplace for owners to offer their properties with the advertised feature that income and expense schedules were available for the purchaser's "hardship application."

It was apparent to the Legislature—as it was to all knowledgeable individuals and groups studying this purely local State problem—that the pivotal reason for these excesses was the almost immediate pass along of the costs to the tenants. Hence, the decision to defer the time within which the purchaser could seek and obtain such recoupment. The consensus was that such action would eliminate many of the abnormalities being encountered in sales and would also curb the inflation of the sales price itself. The only dispute among most authorities was the

extent of the restrications to be imposed (e.g., Minority Report of the Legislative Commission, *supra*).

The courts may not be concerned with questions as to the reasonableness, wisdom, propriety, or desirability of such a statute; nor may they substitute their judgment for that of the Legislature so long as there can be discovered "any state of facts either known or which could reasonably be assumed" to afford support for the legislative decision to act. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154; *East New York Saving Bank* v. *Hahn*, *supra*, 326 U. S. 230, 234; *South Carolina Highway Dept.* v. *Barnwell*, 303 U. S. 177, 191; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 263.

In *East New York Saving Bank* v. *Hahn*, *supra*, a constitutional challenge was directed against the mortgage moratorium statute, originally enacted in 1933, and extended to July, 1944 by Laws of New York, 1943, Ch. 93. Plaintiff urged that "the serious depression and emergency . . . no longer existed at the time of the enactment of Ch. 93 of L. 1943, had not existed for several years and does not now exist." This Court in affirming wrote (p. 234):

> "Appellant asks us to reject the judgment of the joint legislative committee, of the Governor, and of the legislature, that the public welfare, in the circumstances of New York conditions, requires the suspension of mortgage foreclosures for another year. On the basis of expert opinion, documentary evidence, and economic arguments of which we are to take judicial notice, it urges such a change in economic and financial affairs in New York as to deprive of all justification the determination of New York's legislature of what New York's welfare requires. We are invited to assess not only the range and incidence of what are claimed to be determining economic conditions insofar as they affect the mortgage market—bank deposits and war

savings bonds; increased payrolls and store sales; available mortgage money and rise in real estate values—but also to resolve controversy as to the causes and continuity of such improvements, namely the effect of the war and of its termination, and similar matters. Merely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary. * * *"

The courts have uniformly and consistently held that the judicial function in testing statutory constitutionality is limited to the inquiry of whether there is any rational basis upon which the Legislature could have made the challenged classification. As was said in *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 594:

> "The determination of the legislature is presumed to be supported by facts known to it, unless facts judicially known or proved preclude that possibility (Standard Oil Co. v. Marysville, 279 U. S. 582, 584; Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251, 263; South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177, 191-192; United States v. Carolene Products Co., 304 U. S. 144, 153-154). Hence, in passing on the validity of the present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis."

It is apparent that the amendments here challenged have a direct relationship to the salutary objective intended. Indeed, on the basis of the factors here presented, it is manifest that the Legislature acted with extreme wisdom. It is long since settled that an emergency rent control statute—whether enacted by a state in the exercise of its

police power, or the federal government in the exercise of its war power—need not provide for any "fair return" whatever to the individual landlord, so long as "generally fair and equitable" rents are provided for. Just such laws, as we have noted, with no "fair return" provision whatever, were upheld by this Court—*Bowles* v. *Willingham*, 321 U. S. 503 (the Emergency Price Control Act of 1942)—and by the New York Court of Appeals—*Teeval Co., Inc.* v. *Stern*, 301 N. Y. 346, cert. den. 340 U. S. 876 (the 1950 Emergency Housing Rent Control Act).

With respect to appellant's final contention we refer to the principle well settled by numerous decisions of this Court that no person has a vested interest in any rule of law entitling him to having it remain unaltered for his benefit, or, in the alternative, to have any amendments to the law made inapplicable to it. (*Traux* v. *Corrigan*, 257 U. S. 312, 348 and the cases cited therein; *Preston Co.* v. *Funkhauser*, 261 N. Y. 140; *Wasservogel* v. *Meyerowitz*, 300 N. Y. 125.) The applicability of the statutory amendments to appellant's pending proceeding is not violative of its constitutional rights. As recently as November 20, 1961 this Court in *Fruhling* v. *Amalgamated Housing Corp.*, 9 N. Y. 2d 541, appeal dismissed —— U. S. ——, gave judicial approval to the ruling of the New York Court of Appeals that:

> "Under familiar principles, we pass upon the applicability and validity of the statute as it existed on the date of this appeal, rather than the date of the commencement of this action (Strauss v. University of the State of N. Y., 2 N. Y. 2d 464, 465; Black River Reg. Dist. v. Adirondack League Club, 307 N. Y. 475, 486-487; Quaker Oats Co. v. City of New York, 295 N. Y. 527, 536)."

Appellant seeks to have this Court determine the constitutionality of segments of a statute concededly enacted for a lawful purpose. Its entire prayer for relief is

predicated upon the desirability of legislation. We respectfully submit that the proper forum for correction of legislation is a responsive legislature. *Daniel* v. *Family Sec. Life Ins. Co.*, 69 S. Ct. 550; 336 U. S. 220.

CONCLUSION

Since no substantial Federal question is presented, this Court should dismiss the appeal or affirm the judgment of the Court of Appeals appealed from.

Respectfully submitted,

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APPENDIX

EXHIBIT 1

Opinion of Court of Appeals

COURT OF APPEALS, Clerk's Office,
Albany, July 7, 1961.

I. L. F. Y. Co.,

Appellant,

—v.—

TEMPORARY STATE HOUSING RENT COMMISSION, *et al.*,

Respondents.

Decided July 7, 1961.

Chief Judge DESMOND:

Plaintiff has taken a direct appeal from the court of first instance to this court (Civ. Prac. Act, § 588, subd. 4) asserting the invalidity under the Federal and State Constitutions of 1961 amendments (L. 1961, ch. 337) to the Emergency Housing Rent Control Law. While extending the control law (first enacted in 1946) to 1963, the Legislature modified the existing provisions which set up procedures whereby landlords may obtain maximum rent adjustments based on recent sale prices by providing that:

"No application for adjustment of maximum rent valuation based upon a sale price valuation shall be filed by the landlord under this subparagraph prior to six months from the date of such sale of the property. In addition, no adjustment ordered by the commission based upon such sales price valuation shall be effective prior to one year from the

date of such sale." (Emergency Housing Rent Control Law, § 4, subd. 4, par. [a], subpar. [1], cl. [v].)

As revised in 1961, the law forbade retroactive changes in rent (§ 4, subd. 4, par. [a], subpar. [6]). The 1961 amendments were applicable to pending proceedings (§ 13).

On November 19, 1960 plaintiff-appellant contracted to purchase for $1,378,000 a rent-controlled apartment house in Manhattan. Title passed on February 20, 1961 and a week later appellant filed with the Rent Commission an application under subdivision 5 of section 33 of the State Rent and Eviction Regulations for the fixation of a reasonable rent computed as 6% return on valuation of $1,378,000 as shown by the sale price. On April 6, 1961 (this suit was commenced a few days later) and before commission action on the application was completed, the 1961 amendments were enacted. Plaintiff sues for a declaration that they are unconstitutional as to it in that an increase based on purchase price of this property cannot be obtained until at least one year from the purchase date and that any such increase will be prospective only even though by the law as it existed when plaintiff bought the building such increases were retroactive to the date of the filing of the application but for not more than six months (see L. 1957, ch. 755; L. 1959, ch. 695).

Some history should be recalled. During part of the time (up to 1948) when residential rent control was governed by Federal statutes, retroactive increases were not permitted (see *Wasservogel* v. *Meyerowitz*, 300 N. Y. 125). In 1950 the State took over and from 1950 to 1951 there was a temporary freeze of New York City rents pending submission of a new State plan (see L. 1950, ch. 250). The 1951 State act (see chapter 443 of that year) provided for nonretroactive fixation of maximum rents at rates to produce a minimum return on property value but defined value generally as equivalent to the equalized tax assessment. Discretion,

however, was by the 1951 law given to the State Administrator to adopt a valuation other than the adjusted assessment in cases where there had been a sale of the property during the year next preceding March 15, 1951 (see, as to discretion, *Matter of Realty Agency* v. *Weaver*, 7 N. Y. 2d 249, 252). The 1953 statute (see chapters 320 and 321 of that year) extended residential rent control to 1955 but broadened the Administrator's powers so that he might use sale price as value where there had been a bona fide sale between March 15, 1951 and the date of the application. These increases, however, were not to be retroactive. While the 1953 statute was in effect, the administrative practice (confirmed by court decisions; see, for instance, *Matter of Wile* v. *McGoldrick*, 286 App. Div. 826, motion for leave to appeal denied 309 N. Y. 1033) was to use the purchase price as a base unless special circumstances had affected the price.

Appellant stresses the fact that the courts (see *Matter of 340 East 57th St. Corp.* v. *Weaver*, 2 N. Y. 2d 799, and *Matter of Florell Equities* v. *Weaver*, 2 N. Y. 2d 982) held entirely invalid a commission regulation adopted while the 1955 statute (identical with the 1953 act) was in effect and which prohibited the use of a sale price as the valuation base in any instance where the property had been awarded an increase in the past, and which further prohiibted the filing of an application for such an adjustment until the applicant had been owner for a year. That regulation was, however, stricken not for unconstitutionality but because it was unauthorized by statute and contrary to any ascertainable legislative intent, and so was a usurpation by the commission of legislative power.

In 1957 for the first time the Legislature dealt with "resale prices" and the fact or danger of spiraling prices on successive sales. While the use of a bona fide sales price was made mandatory instead of discretionary, the new act

(L. 1957, ch. 755) gave the Rent Administrator discretion where there had been more than one sale within two years prior to the application to "disregard the most recent of sales only if a prior sale within such two-year period was adopted as the valuation of the property" in a rent-increase proceeding. The legislative authorization to use not more than one sale in each two-year period was made in response to a recommendation by the Temporary Commission to Study Rents and Rental Conditions which had reported that the Administrator needed "authority to curb any cycle of successive sales followed by applications for adjustments" (see report, N. Y. Legis. Doc., 1957, No. 22, p. 23).

Turning now to the disputed 1961 additions, we first examine into the validity of the one-year delay and no-retroactivity rules. If these are found not to be intrinsically invalid, we must move to an inquiry as to whether they may constitutionally be made applicable to a sale arranged or consummated before the effective date of the 1961 amendments.

Appellant does not dispute the continuance of the housing emergency which is the predicate for these housing rent control laws. It cannot deny that prohibitions against rent increases may in an emergency be constitutional although they reduce the value of the property regulated and deprive its owner of what otherwise would be considered a fair return (see *Bowles* v. *Willingham*, 321 U. S. 503, 517; *Teeval Co.* v. *Stern*, 301 N. Y. 346, 362, cert. den. 340 U. S. 876). Appellant does suggest that the 1961 Legislature acted illegally when it added new "police power restraints" to the earlier controls without any new finding as to "intensification of emergency" warranting the increased restrictions. We know of no requirement for such a new declaration or description of conditions requiring tightening of controls. The real question on this branch of the

case is whether there was anything before the Legislature justifying the year-delay and nonretroactivity clauses added in 1961.

There is, of course, not only an exceedingly strong presumption of constitutionality (*Defiance Milk Products Co.* v. *Du Mond*, 309 N. Y. 537, 540) but a further presumption that the Legislature has investigated for and found facts necessary to support the legislation (*Lincoln Bldg. Associates* v. *Barr*, 1 N. Y. 2d 413; *East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622, affd. 326 U. S. 230). But, besides those generalities, we have a showing that the Legislature had before it when it legislated on this subject in 1961 three different reports all made in 1961 and the minutes of a public hearing held in Albany in March of that year by the Temporary Commission (see "Survey Report on the Rental and Housing Market" of the Temporary State Housing Rent Commission, Jan., 1961; Report of Governor's Special Committee, Feb. 24, 1961; 1961 Report of the Temporary Commission to Study Rents and Rental Conditions, March 23, 1961 [N. Y. Legis. Doc. 1961, No. 23]).

Appellant says that these reports (the so-called Herman report made to the Governor by the State Rent Administrator and the report of the Governor's five-man or "Gaynor" committee) show that there had not been any widespread practice whereby rent increases were resulting from a series of successive sales at inflated prices with each resale used as a new base for rent calculation. It is true that the Herman report shows, in nine years, only a few such cases and no "widespread practice" of applications granted where there had been a prior grant on a lower sales price. However, the five-man committee's report points out that it is the legislative purpose to provide the Administrator with authority to curb any such cycle. The committee recommended, therefore, the one-year delay and no-retroactivity safeguards. A month later (March 23, 1961) the Temporary

Commission, a different body, reported to the Legislature as required by law (see L. 1948, ch. 675). In its report (N. Y. Legis. Doc., 1961, No. 23) it described public hearings held earlier that month in Albany at which much testimony had been taken. It adopted some of the five-man committee's suggestions, including those with which we are concerned and which the Rent Administrator specifically urged at the hearing. Other speakers told of the "alarming rate" at which apartment buildings were changing ownership at spiraled prices. The Mayor of New York City informed the Temporary Commission that "it is increasingly the practice to sell rent-controlled real estate at inflated prices which bear little relation to the existing rent rolls or market value" and pointed out that under the then law there was nothing to prevent an increase based on that inflated price and then another sale two years later with a similar rent increase. A representative of a tenants' association showed the committee newspaper advertisements indicating that sellers and buyers were taking advantage of this opportunity. All this shows a reasonable basis for legislative action to slow up the process—not so much to deprive owners of sales opportunities or buyers of adequate rents as to remove or prevent conditions creating inflationary spirals of prices and rents. The "actual and manifest evil" which serves as a predicate for police power law-making can consist of a well-founded fear of future trouble. Purchases of rental property at high prices predicated on immediate rent rises could defeat the proper purposes of residential rent control. Thus, the writing of these precautions into the law was, as the Legislature saw it, reasonably necessary for the public welfare. Even if there were no record of any investigation, factual support for the legislation would be assumed by the courts to exist. And so appellant would have a heavy burden as to disputing the Legislature's fact findings made after committee hearings

and reports. Surely this record does not conclusively destroy those findings and any dispute as to underlying facts could not be presented on this direct appeal which brings up constitutional questions only (Civ. Prac. Act, § 588, subd. 4).

There remains appellant's assertion that its constitutional rights were infringed when the 1961 statute was made to apply in this respect to premises purchased at an earlier date. But appellant did not have in any particular rule an interest so vested as to entitle it to keep the rule unchanged (*Preston Co.* v. *Funkhouser*, 261 N. Y. 140; *Wasservogel* v. *Meyerowitz*, 300 N. Y. 125, *supra*). In such situations the applicability and validity of statutes are determined as of the date we make our decision (*Fruhling* v. *Amalgamated Housing Corp.*, 9 N. Y. 2d 541; *Matter of Tartaglia* v. *McLaughlin*, 297 N. Y. 419; *Matter of Boardwalk & Seashore Corp.* v. *Murdock*, 286 N. Y. 494).

The judgment should be affirmed, with costs.

Judges Dye, Fuld, Froessel, Van Voorhis, Burke and Foster concur.

Judgment affirmed.

Appendix.

EXHIBIT 2

The Opinion at Special Term of Judge Greenberg

1. L. F. Y. Co. v. Temporary State Housing Rent Commission—Defendant, the Temporary State Housing Rent Commission, and, by separate motion, the co-defendant move for dismissal of the complaint pursuant to Rule 106 (4). The Emergency Housing Rent Control Law (Chapter 274 of the Laws of 1946, as amended) was further amended (Chapter 755 of the Laws of 1957, as amended by Chapter 695 of the Laws of 1959) and provided for mandatory individual adjustment of maximum rent where the rental income yields a net annual return of less than 6 per cent. per annum of the valuation of the property based upon a bona fide sale of the property within a stated period as defined. Complaint is made of still further amendment by action of the 1961 Legislature (Chapter 337 of the Laws of 1961) in extending the Act to June 30, 1963. By such amendment, it is provided that "No application for adjustment of maximum rent based upon a sales price valuation shall be filed by the landlord under this sub-paragraph prior to six months from the date of such sale of the property," and further that "In addition, no adjustment ordered by the commission based upon such sales price valuation shall be effective prior to one year from the date of such sale." In three causes of action, plaintiff urges unconstitutionality in that it cannot obtain an increase based on the purchase price until one year from the date of its purchase, that orders of adjustment when issued are prospective only, and the amended statute applies to applications retrospectively. Claim of unconstitutionality is based upon the contention that the Legislature failed to set forth additional findings of emergency necessitating intervention of the police power warranting such amendments and they are therefore without support. In Teeval Co., Inc., v. Stern (301 N. Y. 346 [1950 certiorari de-

nied 340 U. S. 876]), the court stated: "In the view of the plaintiff landlord, the State rent control statute will deprive it of a 'fair return' on its investment. If that point can be considered at all on this direct appeal (see Lapchak v. Baker, 298 N. Y. 89, 80 N. E. 2d 751, supra), the answer is plain. The state rent control statute was enacted to meet a passing emergency. It does not contemplate a taking of the property of any landlord. Even though it may now and then, compel an owner to operate his real property at a loss, the statute is not for that reason to be condemned as an arbitrary use of the police power (Bowles v. Willingham, 321 U. S. 503, 516-519, 64 S. Ct. 641, 88 L. Ed. 892)." No challenge is raised to the continuing emergency warranting police power intervention, but rather the challenge is directed to the failure to make additional legislative findings as to the particular amendment. The power to legislate with respect to the emergency is not spent merely because the Legislature has once before mandated upon the particular subject. The motion is granted and the complaint is dismissed.

I. L. F. Y. Co. v. Temporary State Housing Rent Comm'n —Defendant Meehan moves for dismissal of the complaint pursuant to Rule 106(4). The motion is granted and the complaint is dismissed. See disposition of companion motion published simultaneously herewith.

Appendix.

EXHIBIT 3

Challenged Provisions of the Statute

Pertinent provisions of the Emergency Housing Rent Control Law of the State of New York, as amended (Chapter 337, Laws of 1961).

Subdivision 4(a)(1) of Section 4 of the Emergency Housing Rent Control Law as amended on April 20, 1961, provides:

> "No application for adjustment of maximum rent based upon sales price valuation shall be filed by the landlord under this sub-paragraph prior to six months from the date of such sale of the property."

Said subdivision further provides that:

> "In addition no adjustment ordered by the commission based upon such sales price valuation shall be effective prior to one year from the date of such sale."

Subdivision 4.6 of Section 4 of the amended statute provides as follows:

> "No increase or decrease in maximum rent shall be effective prior to the date on which the order therefor is issued."

Section 13 of the statute and of the amended statute provides in part as follows:

> "Pending proceedings. The commission may provide for and authorize the continued processing of any application or proceeding pending at the time this act becomes effective; provided, however, that final determination of the commission in such pending application or proceeding shall not be inconsistent with this act."

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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

I. L. F. Y. Co.,

Appellant,

—against—

THE TEMPORARY STATE HOUSING RENT COMMISSION and MARY ALICE JONES,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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IN THE

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

This brief is submitted pursuant to Rule 16 (3) of the Rules of the Supreme Court of the United States.

Appellee's motion to dismiss is based on its contention that no substantial federal question is raised. This is predicated on the theory that the challenged amendments fall completely within the "specific competence of the New York State Legislature to enact statutory provisions reasonably adopted to a real and undisputed public need" (appellee's brief p. 4).

Appellee's motion was filed on or about January 9, 1962, and by order of Mr. Justice Harlan, appellant was granted until May 8, 1962, to file its brief in opposition so as to submit the intervening fluid situation to this Court. The chaotic legalistic merry-go-round which has occurred since the determination of the New York Court of Appeals sought

to be reviewed here and particularly since the filing of appellee's motion, itself constitutes a complete reply to the claim of "special competence of the New York State Legislature" to act in this field. We cite the following factual events in the order of their occurrence.

1. On July 7, 1961, the New York Court of Appeals sustained as constitutional a statutory requirement that the purchaser of real estate, the income of which is insufficient to provide a reasonable return on its value must wait six months from the date of purchase before applying for leave to increase the rents and one year from the date of purchase before collecting an increase in rent. Chief Judge Desmond writing for the unanimous Court had held:

> "All this shows a reasonable basis for legislative action to slow up the process—*not so much to deprive owners of sales opportunities or buyers of adequate rents* as to remove or prevent conditions creating inflationary spirals of prices and rents." (See appendix to Jurisdictional Statement pp. 6A-7A. Emphasis supplied.)

2. On September 13, 1961, the appellee Commission determined appellant's purchase price to constitute a bona fide sales price under the statute and held in part as follows:

> "The sale in the sum of $1,337,375 was found to be a bona fide sale, at arms' length, on normal financing terms, at a readily ascertainable price and unaffected by special circumstances. *This sum should* therefore be used as the base in this proceeding." (Emphasis supplied.)

(A true copy of this valuation memorandum is reprinted in the appendix to this brief as Exhibit A.) (pp. 1a-2a.)

3. On October 10, 1961, appellee's accounting section returned the file to its Local Rent Administrator with the

directive for the "issuance of orders as indicated on attached form" but with the notation:

"Special Note to the Local Rent Administrator

"The basis of eligibility used in this application was the Purchase Price. The property was acquired by the landlord on February 20, 1961, and, therefore, no orders may be issued earlier than one year after this date."

(A true copy of this transmittal memoraadum is reprinted in the appendix to this brief as Exhibit B.) (See p. 3a.)

4. The attached form referred to in the transmittal memorandum established that appellant was entitled to a rental adjustment of $33,653.25. (A true copy of said form in printed in the appendix to this brief as Exhibit C.) (See p. 4a.)

5. On October 30, 1961, Robert E. Herman, the Administrator of the appellee Commission, issued Operational Bulletin 44 which stayed the final determination of all orders in fair return proceedings. (A true copy of said Operational Bulletin with accompanying Governor's statement is reprinted in the appendix to this brief as Exhibit D.) (See pp. 6a-11a.)

6. On January 22, 1962, there was introduced in the Legislature and on February 17, 1962, there was enacted into law Chapter 21, Laws of 1962, known as the Local Emergency Housing Rent Control Act which effective May 1, 1962, transfers the administration of rent controls to the City of New York. (See McKinney's 1962 Session Law News Supplement #2 issued February 25, 1962, pp. 51-64.) The provisions of said transfer statute here material are the following:

A. From February 17, 1962, until May 1, 1962, all rent increase proceedings except those involving voluntary increases are frozen. ("Maximum Rents shall not be increased during the period between the effective date of this act and May 1, 1962." Section 6.)

B. Effective May 1, 1962, the city is authorized to adopt new laws and regulations governing residential rents and evictions not necessarily consistent with the state statute (subd. 5 of Section 1).

C. Effective May 1, 1962, the city rent agency created by said transfer statute succeeds to all of the functions of the appellee Commission within the City of New York (subd. 6 of Section 1).

D. Effective May 1, 1962, jurisdiction of the appellee Commission over rent control in the City of New York is abolished (subd. 12 of Section 1).

E. Effective May 1, 1962, all pending proceedings including applications for rent adjustment undetermined before the Local Rent Administrator and orders on administrative appeal or protest are transferred to the city agency subject to redetermination by said city agency under its own law and regulations (subd. 11 of Section 1).

7. The effective date of the transfer statute, February 17, 1962, was *three days short* of the expiration of the one-year moratorium approved by the New York Court of Appeals, and, accordingly, the orders already typed for the $33,000 rent increase, acknowledged by appellee Commission to be required for the establishment of a reasonable rent, could not be issued.

8. On or about April 24, 1962, the City of New York, as authorized by said Chapter 21, Laws of 1962, adopted a local law known as the City Rent & Rehabilitation law. The provisions of said local law here material prohibit the

filing of any application for reasonable rent *until after two years of ownership* or *until February 20, 1963*, and affirmatively require the denial of appellant's application solely because of the pyramiding of these moratorium periods. (The provisions of the local law here material are printed in the appendix to this brief.) (See Exhibit E, p. 12a.)

It is respectfully submitted that this whirling dervish operation is at war with appellee's contention that the New York State Legislature had "special competence" (brief p. 4) to evaluate the situation. It is respectfully submitted that the bootstrap accumulation of a one-year pre-ownership moratorium, superseded on October 30, 1961, by an administrative freeze, on February 17, 1962, by a legislative freeze, and on May 1, 1962, with a two-year ownership condition precedent, demonstrates beyond peradventure of a doubt that this does not constitute reasonable police power regulation.

Appellant challenged validity of the February 17, statutory rent freeze and appeals therefrom were argued before the New York Court of Appeals on March 26, 1962, but could not be determined in time for the issuance of the orders prior to May 1, 1962, the effective date of City Rent Control.

Appellant's Jurisdictional Statement basically posed two questions, namely: Was appellant's property taken without due process and without just compensation:

(1) by the 1961 statute (Chapter 337, Laws of 1961), which established the six months ownership prefiling condition and one year ownership preincrease condition with the accompanying prohibition on retroactivity?

(2) by subjecting appellant's petition for reasonable rent relief to the amendments as a pending proceeding,

> although filed prior to the effective date of the 1961 amendments?

If, as we claim, the retroactive application of the challenged amendments to pending proceedings violated appellant's constitutional rights, then this court would have to reverse and would not necessarily reach the broader question of constitutionality. We have found no authority for this Court approving this retroactive police power exercise except *Fruhling* v. *Amalgamated Housing Corporation*, 9 N. Y. 2nd 541, appeal dismissed, —— U. S. —— (11/20/61) cited on p. 19 of appellee's brief.

Fruhling, we submit, is readily distinguished because there a tenant of a cooperative was subjected to an added surcharge by the adoption of a law subsequent to his occupancy. A tenant, unlike a property owner, has no vested property right. As Chief Judge Desmond of the New York Court of Appeals, then an Associate Judge of the Court, held many years ago in *Wasservogel* v. *Meyerowitz*, 300 N. Y. 125:

> "No vested or property right of a tenant is taken when his rent is raised."

A property owner, unlike the *Fruhling* tenant, does have a basic property right. Absent the police power, the *Fruhling* tenant who was granted a partial subsidy had no possessory rights. Conversely, here, absent the police power, appellant could adjust the rentals for his property commensurate with the market and without the intervention of any Court or administrative agency. The measure and degree by which such property rights may be regulated until it amounts to a taking of the property is at the very heart of this appeal. As Mr. Justice Holmes noted many years ago in *Block* v. *Hirsch*, 156 U. S. 135, 156:

> "The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of Eminent Domain; it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."

Thus, we strongly urge that the retroactive application of the police power here must fall and should be reversed.

In the alternative, if this Court agrees with the New York Court of Appeals that, "The application and validity of statutes are determined as of the date we make our decision" (see appendix to Jurisdictional statement, p. 7A), then this Court, we submit, would consider the panorama of pyramiding freezes as they exist as of May 8, 1962, when this brief is submitted. As of this date, the one-year ownership condition precedent which prevented issuance of the reasonable rent orders on October 11, 1961, when the application was completed, has ripened into a two-year prefiling condition precedent. Under such circumstances the challenged 1961 amendments have become the proximate cause of a moratorium prohibiting appellant from securing rents which appellee has concededly found to be reasonable for the better part of three years, namely two years before filing plus a processing period of six to nine months.

In this posture, we recognize that this Court presumably would not wish to consider the basic validity of the New York City local law because the New York Court of Appeals has as yet had no opportunity to pass upon it. We respectfully submit, however, that this Court does have before it the question as of May 8, 1962, whether a statute is intrinsically valid which in effect provides that any purchaser of property subsequent to February 16, 1961, is precluded from

securing a reasonable return reflective of a reasonable rent until

(a) After one year's ownership (Chapter 337, Laws of 1961), plus

(b) until May 1, 1962 (the February 1962 freeze of Chapter 21, Laws of 1962) plus

(c) a refiling in February 1963 after two years ownership plus

(d) such added time it requires the city to process an application.

This is a bootstrap freeze which has entrapped appellant and stripped him of his constitutional rights.

Appellee's entire support for the original challenged amendments was predicated upon "the massive data considered by the Legislature" (appellee's brief, p. 16) which resulted in "the decision to defer the time within which the purchaser could seek and obtain" his reasonable rent, and that "such action would eliminate the abnormalities being encountered in sales and would also curb the inflation of the sales price itself."

The reference to massive data consistently referred to by appellee is illusory because the special five-man committee appointed by the Governor stated specifically in its report of February 24, 1961:

> "There is obviously little support in fact for the assertion that a 'widespread practice' exists of 'repeated sales' resulting in 'spiralling rents'." (See reprint of report McKinney's 1961 Session Laws, p. 1986 @ p. 1988.)

It is thus clear that the basic report reflecting alleged massive data itself concedes that there is no data and,

accordingly, no basis exists for police power intervention to deprive appellant of its reasonable rents reflective of a reasonable return for these moratorium periods.

There is moreover little left of appellee's argument when less than a year after the challenged amendments were adopted the "massive data" are brushed aside, a freeze is imposed and the entire operation is delegated to another subordinate branch of government without any compensation for the period under the state's own police power controls. Here appellee has concededly found the sale price to be above reproach and unaffected by "abnormalities". Additionally, beyond peradventure of a doubt appellee has determined that appellant is $33,000 short of earning a reasonable return reflected by a reasonable rent.

Appellee's brief (p. 5) suggests that over the years the basis for establishment of maximum rents has progressively changed. This represents an additional illusory concept. Since March 15, 1951, a property owner has been entitled to a minimum return calculated on the value of the property. So far as here material, from March 15, 1951, until June 30, 1957, the valuation of the property was defined as the current equalized assessed valuation with discretion in the appellee to adopt a different basis of value in four enumerated instances *inter alia* where there had been a recent bona fide sale of the property. This statutory discretion was interpreted by the courts as in effect justifying departure from an authorized alternate valuation only upon the basis of "sound considerations in fact and law". (See *Matter of Abrams* v. *McGoldrick*, 282 App. Div. 192, cited with approval on this point by the New York Court of Appeals in *Matter of Realty Agency, Inc.* v. *Weaver*, 7 N. Y. 2d 249.)

Effective June 30, 1957, this limited discretion to adhere to the equalized assessed value, in lieu of the statutorily

authorized alternate valuation, was revoked and the appellee was mandated to adopt a recent bona fide sales price as the valuation base. This statutory change was interpreted by the New York Court of Appeals in *Matter of Realty Agency, Inc.* v. *Weaver, supra,* as follows:

> "Subdivision 4 (par. (a)4(1)) in its present form, expressly mandates the use of sale price if the sale took place after March 15, 1953, as opposed to assessed valuation, *for as the Legislative Commission pointed out, bona fide sales prices are 'a more accurate reflection of value in fair return applications'* (N. Y. Leg. Annual 1957, p. 264; Ackerman v. Weaver, 6 N. Y. 2nd 283, 287)." (Emphasis supplied.)

The challenged statutory provisions in effect adopt a valuation prescription that upon evidence of existence of a better reflection of value than equalized assessment, namely a recent bona fide sale price, the property owner, appellee here, must wait to use that evidence until one year has elapsed from the date the evidence has become available.

Appellant respectfully submits that the bona fide sales price so determined by appellee in its valuation memorandum of September 13, 1961, printed in the appendix was not made any more bona fide or any more reflective of value by the interposition of the statutory moratorium which to date has deprived appellant from securing its reasonable return. If as appellee found on September 12, 1961, that the reasonable rents to provide a reasonable return should be increased by $33,000 on February 20, 1962, such an increase was no less reasonable and such a valuation was no less fair one year earlier at the time of the sale.

The statute is directed at the prevention of "unjust, unreasonable and oppressive rents" (Section 1). The chal-

lenged statute has demonstrably deprived appellant of "reasonable rents". Intervention of the police power is justified in the interests of the protection of the health, safety and welfare of a considerable number of people but it could never be used as a subterfuge to force property owners to subsidize tenants at free rent. The margin between a subsidy at a free rent and a subsidy at less than a reasonable rent has no legal substance.

In *Block* v. *Hirsch*, *supra*, this Court, speaking through Mr. Justice Holmes, observed that the statute provided machinery to fix a reasonable rent. Here the machinery was provided under an illusory basis but rendered inapplicable to appellant.

The cha lenged statutory provisions were arbitrary and invalid from the moment of their enactment. The legalistic merry-go-round described *supra* has merely dramatized the error of law committed by the New York Court of Appeals when it approved the statute as reasonable in 1961 on the mistaken assumptions that appellant would receive an increase by February 20, 1962. The intervening facts merely serve to illustrate the breach of appellant's constitutional rights. No further argument than the very existence of such facts is required.

CONCLUSION

The motion to dismiss should be denied. There are very substantial federal questions involved. The judgment below should be reversed; or in the alternative a plenary hearing of the constitutional issues should be permitted or in the further alternative, the appeal should be remitted to the New York Court of Appeals for further consideration in the light of the pyramided freezes now existing.

Respectfully submitted,

ROBERT S. FOUGNER
Counsel for Appellant

McLAUGHLIN & FOUGNER
ALBERT W. FRIBOURG
Of Counsel

APPENDIX

Exhibit A

Sept. 13, 1961

MEMORANDUM TO THE FILE

SUBJECT: Docket No. AO 101095
Premises: 320 E. 57th St.
New York, N. Y.

The sale in the sum of $1,377,375.00 was found to be a bona fide sale, at arms' length, on normal financing terms, at a readily ascertainable price and unaffected by special circumstances. This sum should, therefore, be used as the base in this proceeding.

In considering the question of the normalcy of the financing terms, due consideration was given to:

1. The ratio of the cash payment received by the seller to

   a. the sale price of the property, and

   b. the annual gross income from the property.

2. The total amount of the outstanding mortgages which are liens against the property at the time of the closing (including purchase money mortgages) as compared with the equalized assessed valuation of the property.

3. The ratio of the sale price to the annual gross income of the property with consideration given to the total amount of prior financial rent adjustments, exclusive of rent adjustments because of changes in dwelling space, services, furniture, furnishings or equipment, major capital improvements, or substantial rehabilitation.

Exhibit A

4. The presence of deferred amortization in purchase money mortgages, or the assignment of such mortgages at a discount, and

5. Any other facts surrounding the sale which may have a bearing upon the question of financing.

SPECIAL NOTE TO THE LOCAL RENT ADMINISTRATOR

The basis of eligibility used in this application was the purchase Price. The property was acquired by the landlord on Feb 2, 1961 and, therefore, no orders may be issued earlier than one year after this date.

STATE OF NEW YORK 'Accounting Division'
TEMPORARY STATE HOUSING RENT COMMISSION' 250 Broadway 'Docket
New York 7, N. Y. 'No. AD-101085-LM

ACCOUNTING DIVISION DOCKET TRANSMITTAL 36506

TO: (Local Rent Office) Re: 320 East 57th Street
Address of Property

LOWER MANHATTAN (90)

The attached docket is transmitted for action in accordance with item marked below:

RECOMMENDATION:

.....1. Issuance of denial orders because of failure to qualify.

.....2. Issuance of denial orders because of failure to submit evidence.

.....3. Issuance of denial orders based on applicant's letter of withdrawal attached.

..X...4. Issuance of adjustment orders as indicated on attached form.

.....5. (Other).....

.....

.....

NOTE:

☐ Place an "X" in this space if bills have been mailed back to applicant.

OCT 11 ...

.....
(Transmitted by)

.....
(Title)

October 10, 1961
.....
(Date of Mailing)

nr # 4

FORM C-33B (Rev.10-61)

Exhibit C

(See opposite) ☞

STATE OF NEW YORK
EMERGENCY STATE RENT COMMISSION
ACCOUNTING DIVISION

AREA SUPERVISOR: LRO

No. of Rooms 319 5
No. of Elev. (Auto.)
No. of Elev. (Man.)
Walk-up 2 0

7. Income and Expenses for Year Ended: 11 (Month) 30 (Day) 60 (Year)

Docket No. GO 101095
L.R.O. Lower Manh. No. of Units 90

ITEM		As Submitted (A)	Adjustments (B) Plus:	Adjustments (C) Minus:	As Adjusted (D)
INCOME	Per Schedule				
8. Rental	A	176379 00		347.76	176031.24
9. Other	B	164 16		4 33	159.83
10. TOTAL INCOME		176543 16		352.09	176190 57
EXPENSES	Per Schedule		Minus:	Plus:	
11. Fuel	C	11020 62	135 47		10885 15
12. Utilities	D	9284 07	50 60		9233 47
13. Payroll & Related Costs	E	43431 42		726 63	44158.05
14. Real Estate Taxes	F	29540 00	1440		28096 00
15. Insurance	G	2575 52	301 86		2273.66
16. Management	H	2276 27	10 57		5285 70
17. Repairs & Maintenance	I	11715 31	2531 78		9183 53
18. Replacements & Improvements	J	— 0 —			— 0 —
19. Miscellaneous	K	1165 73	207 49		957.24
20. Depreciation	L	16534 00	7 50		16526 50
21. TOTAL EXPENSES		131564 76	5090 27	726 63	127201 32
			Plus:	Minus:	
22. NET OPERATING INCOME FOR THAT YEAR		44978 40	5090 27	1079 22	48989 25
(Difference between Items 10 and 21. Sum of Items 10 and 21.)					
23. Assessed Valuation: Year	76/61		$ 70,000 -		
24. RATIO OF LIABILITY (Complete either (a) or (b) below):					
(a) Qualified A.V. (A.V. divided by Rate of					
(b) Any Alternate Valuation, per Form 4-1(5)G -					
Nature - Low Income Limit					12642.50
25. NET INCOME (24 (b) of Item 24)					36653.25
26. NET OPERATING INCOME (Item 25 minus Item 22)					19.2 %
27. Percent of Rental Income (Item 26 divided by Item 8)					

Prepared by: [signature] Title Reviewed by: Title Date

P 4-1(5)G (12-60)

Exhibit D

OPERATIONAL BULLETIN STAYING FINAL ACTION ON FAIR RETURN CASES

STATE OF NEW YORK

TEMPORARY STATE HOUSING RENT COMMISSION
280 Broadway
New York 7, N. Y.

October 30, 1961

Operational Bulletin No. 44—State by Governor Rockefeller

Appended hereto is the Statement by Governor Nelson A. Rockefeller released Sunday, October 29, 1961, on the subject of rent control and the Commission's review of all applications under the fair return provision of the Law to determine the effect of the 1961 equalization rates upon tenants.

Pending completion of the review, no final action on fair return applications (Sec. 33(5)) may be taken.

Robert E. Herman
Commissioner and
State Rent Administrator

THE NEW YORK TIMES, MONDAY, OCTOBER 30, 1961.

Text of Governor's Curb on Rent Rises

Following is the text of Governor Rockefeller's statement announcing a temporary freeze on rent increases under the equalization provisions of the 1961 Emergency Rent Control Law.

For several weeks Mayor Wagner has conducted a campaign of falsehood and vilification of the State Legislature and my administration with respect to rent control in New York City.

The hysterical nature of the Mayor's attacks have been such as to alarm tenants and to grossly distort the record. I am therefore issuing this statement to clarify the situation and outline a course of action.

I have stated repeatedly that rent control must and will be continued to protect tenants so long as the crisis in housing exists. The real answer to the problems of tenants and landlords alike is, of course, a free and competitive market resulting from more and better housing. The Mayor's negative response to my proposals for new state-financed middle-income housing for 1,000,000 residents of New York City is a measure of his insincerity and lack of imagination in this field.

City Control Invited

If the Mayor is dissatisfied with the state's handling of rent control, the City of New York could have taken over the regulation of rents within its boundaries at any time in the past six years. The city has this option right now under Section 13-A of the rent-control law enacted in 1953 during the Harriman administration. Yet the Mayor has dodged this home rule option throughout these six years. And now under challenge from Attorney General Lefkowitz, he again seeks to evade acceptance of responsibility in a field in which he is loud in his complaints at election time.

Associated Press

STUDYING RENT LAW: Robert E. Herman, State Rent Administrator. Rent increases in state will be frozen until he completes his study of effects of the new equalization provision.

Most tenants will remember that the only reason the State of New York became involved at all in New York City rent control was the complete breakdown due to maladministration and corruption in rent control in the city in 1959.

I pledged in my 1958 campaign for Governor that I would strengthen rent control, and this I have done.

Legal Actions Listed

In the 1960 session of the Legislature, during the first year of my administration, the following action was taken to close loopholes in the rent-control law:

¶Control was extended to certain rooming houses which had previously evaded rent regulations.

¶Certain pseudo-hotels, which had been decontrolled by administrative order during the Harriman administration, were returned to rent control.

¶Decontrol was prevented for buildings where unscrupulous landlords had deliberately permitted disrepair to obtain an order to vacate from local building inspectors.

¶Treble-damage actions were permitted on behalf of a tenant against a landlord who had not complied with an order of the Rent Commission to refund overcharges.

Again, in 1961, when the rent-control law was extended for another two years, the law was further strengthened in favor of tenants.

¶Rent increases based upon real estate speculation were eliminated.

¶Retroactivity of rent increases granted under "fair return" proceedings was eliminated.

¶Provisions of the law to protect tenants evicted to permit demolition and construction of new housing were strengthened.

The Present Controversy

Despite these seven major actions to strengthen rent control thus far in my administration, controversy now arises over an action taken in the 1961 session.

I refer specifically to the amendment permitting use of the most recent equalization rates in place of the 1954 equalization rates to determine full value of a rental property in "fair return" proceedings.

This use of current equalization rates was included in the 1961 rent-control law, based upon recommendations of the bi-partisan Temporary State Commission on Rents and Rental Conditions. Neither the Democratic nor the Republican members of the commission raised any question at the time as to the fairness of using the latest equalization rates as the basis for determining full value of a rental property in "fair return" proceedings.

The logic of this bi-partisan conclusion was based upon the essential purpose of equalization rates—which is to supply a mathematical average for computing from assessed values the true market value of a property. The latter value, in turn, is the basis for computing the 6 per cent annual return permitted landlords under the Rent Control Law.

This action was taken, however, prior to completion and announcement in June, 1961, of the new equalization rates by the Board of Equalization and Assessment. The legislative action therefore was based upon a logical assumption of equity—but without detailed information on the specific impact of the new equalization rates, since they were not then available.

Rise in Applications

The renewed and amended rent law and the new equalization rates became effective on July 1. Since then, in New York City during the July 1 to Sept. 30 period, applications for rent increases under the new equalization rates have risen to a total of 1,082 buildings for the three months, compared with 688 for the same three months last year.

Only some fifty of these have been approved, including an average of five tenants for each application.

As soon as the possibility appeared of an unanticipated impact of the application of the 1961 equalization rates, I directed the Rent Administrator to give intensive study to all applications to determine the precise effect of these rates upon tenants.

Consequently:

1. This review of all such applications is continuing. Pending its completion the Rent Administrator will not take final action upon these applications from the landlords.

2. I shall promptly propose amendments to the rent-control law which will eliminate whatever inequities are disclosed resulting from application of the 1961 equalization rates.

Exhibit D

RELEVANT PORTIONS OF CHAPTER 21, LAWS OF 1962 FREEZING RENTS AND TRANSFERRING RENT CONTROL TO THE CITY OF NEW YORK.

Section 6 freezes all maximum rents from February 17, 1962, to May 1, 1962, and prohibited the issuance of the orders on appellant's application with the following provision:

§6. Notwithstanding any provision of chapter three hundred thirty-seven of the laws of nineteen hundred sixty-one, maximum rents established in any city having a population of one million or more pursuant to the emergency housing rent control law, as last amended by such chapter, shall not be increased during the period between the effective date of this act and May first, nineteen hundred sixty-two, except with the voluntary written consent of the tenant affected.

Subdivision 5 of Section 1 authorizes the City of New York effective May 1, 1962, to adopt its own rent control laws and regulations with the following provision:

5. *Authority for local rent control legislation.* At any time after the effective date of this act, each city having a population of one million or more, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws or ordinances in respect of the establishment or designation of a city housing rent agency. When it deems such action to be desirable or necessitated by local conditions, such city is hereby authorized and empowered to adopt and amend local laws or ordinances effective on or after May first, nineteen hundred sixty-two in respect of the regulation and control of residential rents, with provision for the establishment and adjustment of fair

Exhibit D

and equitable maximum rents, the classification of housing accommodations, the regulation of evictions, and the enforcement of such local laws or ordinances. The validity of any such local laws or ordinances, and the rules or regulations promulgated in accordance therewith, shall not be affected by and need not be consistent with the provisions of the state emergency housing rent control law or with the rules and regulations of the temporary state housing rent commission thereunder.

Subdivision 6 of Section 1, effective May 1, 1962, transferred all functions of the appellee Commission within the City of New York to the City rent agency and provides as follows:

6. *Succession of city agency to state rent control functions within city.* All the functions and powers possessed by and all the obligations and duties of the temporary state housing rent commission and the state rent administrator under the provisions of the state emergency housing rent control law and the rules and regulations of the commission thereunder, insofar as they relate to the regulation and control of residential rents and evictions within a city having a population of one million or more, shall be transferred to the city housing rent agency of such city on May first, nineteen hundred sixty-two, subject to the provisions of any local laws, ordinances, rules or regulations adopted pursuant to subdivision five of this section. All acts, orders, determinations, decisions, rules and regulations of the temporary state housing rent commission relating to the regulation and control of residential rents and eviction within such city which are in force at the time of such transfer shall continue in force and effect as acts, orders, determinations, decisions, rules and regulations of such city housing

rent agency until duly modified, superseded or abrogated pursuant to such local laws, ordinances, rules or regulations.

Subdivision 12 of Section 1 terminated effective May 1, 1962, the jurisdiction of the appellee Commission over rent control in the City of New York with the following provision:

12. *Termination of state regulation and control.* On and after May first, nineteen hundred sixty-two, the temporary state housing rent commission and the state rent administrator shall have no jurisdiction over the regulation and control of residential rents and evictions within any city having a population of one million or more.

Subdivision 11 of Section 1 provides for the transfer effective May 1, 1962, of all proceedings pending before the appellee Commission as of May 1, 1962, including appellant's application in the following language:

11. *Transfer of certain pending matters.* Except as provided in subdivision thirteen of this section, any matter, application, proceeding or protest undertaken, filed or commenced by, with or before the temporary state housing rent commission or the state rent administrator relating to the regulation and control or residential rents and evictions within a city having a population of one million or more and pending on May first, nineteen hundred sixty-two, shall be transferred to, conducted by, and completed or determined by the city housing rent agency. In discharging such responsibilities the city housing rent agency shall act in conformity with the provisions of the state emergency housing rent control law, and the rules and regulations promulgated thereunder, governing such matters, applications or proceedings, unless at the time such action is taken,

such state law, and the rules and regulations promulgated thereunder, have been amended or superseded by local laws, ordinances, rules or regulations adopted pursuant to subdivision five of this section, and in such event, in conformity therewith to the extent such local law, ordinances, rules or regulations are made expressly applicable to such matters, applications or proceedings.

Exhibit E

RELEVANT PORTIONS OF CITY RENT AND REHABILITATION LAW

Effective May 1, 1962

The provisions of the City Rent & Rehabilitation Law here material and hereinafter referred to as the city rent law are the following:

(a) The prohibition against the filing of an application for a 6% return until two years from the date of purchase of the property, in that Section Y41-5.g(1)(a)(2)(ii) provides as follows:

> "An application for an increase in any maximum rent under this subparagraph (a) may not be filed with respect to any property if on the date when the application is sought to be filed:
>
> "(ii) Less than two years have elapsed since the last sale of the property occurring before or after May 1st, 1962, and the application is based on a sale price in excess of the assessed valuation."

(b) The applicability of the foregoing two-year pre-filing waiting period to a pending proceeding filed under the state statute by requiring a dismissal of such pending proceeding in the following directive:

> "The city rent agency shall treat such application as if it were sought to be filed May 1, 1962; provided, however, that in any case where the provisions of such subsections (i) and (ii) (reference to the two-year pre-filing ownership period) would require the denial of any such application if it were so treated, but would

Exhibit E

not require the denial thereof if such application were treated as if it were sought to be filed on September 1, 1962, the city rent agency, notwithstanding any other provision of this title, shall withhold determination of such application until such September 1, 1962, and solely for the purposes of applying the provisions of such subsections (i) and (ii) thereto shall treat such application as if it were filed on such September 1, 1962" (Sec. Y41-14.b).